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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. A-869

BOBBY JOE CRAIG
Petitioner

VERSUS

SUN OIL COMPANY OF PENNSYLVANIA
and WILLIAM R. CLAIBORNE
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Tenth Circuit

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SUN OIL COMPANY OF PENNSYLVANIA
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PETITION FOR WRIT OF CERTIORARI
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For The Tenth Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner Bobby Joe Craig, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on April 28, 1975.

All emphases in quotations in this petition are added unless otherwise stated.

OPINIONS BELOW

The Court of Appeals affirmed summary judgment for respondents in the District Court for the Northern District of Oklahoma. The opinion of the Court of Appeals is reported in 515 F.2d 221 and in 1975 Trade Cases [Section 60,290]. It was argued January 20, 1975 and decided April 28, 1975; Appendix A is a copy. The opinion of the District Court is in its summary judgment and is unreported; Appendix B is a copy.

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 28, 1975; Appendix C is a copy. A petition for rehearing was denied on January 14, 1976; Appendix D is a copy. This Court granted a 30 day extension on April 5, 1976, a 13 day extension on May 3, 1976 and a 12 day extension on May 18, 1976, within which to petition for certiorari. Appendix E is a copy.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1.

This Court having *expressly* held in *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962) on a motion for summary judgment by defendant under F.R. Civ.P. Rule 56, that an *additional* claim stated by *Poller* in a civil antitrust complaint in the form of the conclusion of the pleader "that the conspiracy was the destruction of U.H.F. broadcasting entirely", that was

disputed under the *pleadings* but *without a shred of evidence to support it;* remained a *factual dispute* to be determined on a trial, *may* the *Court* below *hold* on a motion for summary judgment by *defendant* under F.R. Civ.P. Rule 56, that an *additional* claim stated by Craig in a civil antitrust complaint in the form of the conclusion of the pleader "that his business was destroyed as a result of concerted acts of discrimination in facilities";[1] that was *disputed*[2] under the *pleadings* but *without a shred of evidence to support it,* as commented on by the Court below,[3] to wit:

> "The allegations of the complaint relating to discrimination in the furnishing of facilities are conclusionary only. The record contains *nothing* which could relate to such an allegation".

did *not* remain a *factual dispute* to be determined at a trial in *direct* conflict with what this Court has *plainly* held?[4]

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[1] Numbered para. 2 and 13 of the Amended Complaint App. N (R p. 6, 7, 8). 15 U.S.C.A. Sec. 13(b), (d) and (e) inter alia pertaining to discrimination in facilities under the Clayton Act, as amended by the Robinson-Patman Act, Section 2(b), (d) and (e); (d) refers to facilities furnished by the *customer*; (e) refers to facilities furnished by the *supplier.*

[2] (R p. 34, 36).

[3] Numbered page A-7 of the opinion of the Court of Appeals (App. A).

[4] See also *Hurtado v. United States,* 410 U.S. 578, 587 [5] 1973 an additional claim in form of a conclusion remained a factual dispute; and *United States v. Employing Plasterers Assoc.,* 347 U.S. 186, 188, 189, allegations in a civil antitrust complaint whether stated as *facts* or mere *conclusions* of the pleader must be taken into account on a motion to dismiss under F.R. Civ.P. Rule 12(b).

(a) And this Court having *expressly* held in *Adickes v. Kress & Co.,* 398 U.S. 144, 159, 160 (1970) that the *burden of proof* is on the *moving* party under F.R. Civ. P. Rule 56(c) to show *initially* the *absence* of a genuine issue of material fact, *may* the *Court* below *affirm* summary judgment for the defendants [respondents] when it is *patent* from the *above* comment of the Court that the defendants did *not* carry their burden of proof to show *initially* the *absence* of discrimination in facilities, as the Court states there is *nothing* in the record that could relate to such an allegation, in *direct* conflict with what this Court has *plainly* held?

(b) And as the *above* comment of the Court below is tantamount to an *express* finding by the Court below that there *is a genuine issue of material fact* in regard to discrimination in *facilities* which would be within the *exclusive province of the jury* to decide in as much as Craig has the right to a jury trial[5] and has requested a jury trial;[6] *does* the *Court* below have the *power* to *affirm* the summary judgment and thereby *deprive* Craig of a jury trial *contrary* to the express provisions of the Seventh Amendment[7] to the Constitution of the United States and F.R. Civ.P. Rules 38[8] and 56[9]?

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[5] The right to a jury trial applies to treble damage actions under the antitrust laws *Beacon Theatres v. Westover,* 359 U.S. 500, 504.

[6] (R.21).

[7] Seventh Amendment post.

[8] F.R. Civ.P. Rule 38 post.

[9] F.R. Civ.P. Rule 56 post.

The Seventh Amendment is a limitation upon all *powers* delegated by the Constitution to those agencies which comprise the Government of the United States including *all* Federal Courts . . . the right which is secured by the Seventh Amendment is not a matter of procedure but a matter of *substance* and one *"possessing" such right cannot be "deprived" of the same by "any means" short of* an *"amendment" to the Constitution, Minneapolis & St. L. R. Co., v. Bombolis,* 241 U.S. 211 (1916). The controlling distinction between the *power* of the Court and the *power* of the jury is that the former has the *power* to determine the *law* and the latter has the *power* to determine the *facts, Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). Any seeming curtailment of the right to jury trial should be *scrutinized* with the *utmost* care, *Beacon Theatres v. Westover,* 359 U.S. 500, 501 (1959). The limitation imposed by the Amendment is that the *ultimate* determination of *issues* of fact by the *jury* be not *interfered* with, *Colgrove v. Battin,* 413 U.S. 149, 160 [8, 9] 1973.

Is not the *act* of the *Court* below in *affirming* summary judgment an *interference* with the *ultimate* determination by the *jury* of the *genuine issue of material fact* of discrimination in *facilities* that *affirmatively* appears in this *case* on the *face* of the decision of the Court below and therefore beyond the *power* of the Court to do? Is not *Craig* entitled to a *jury trial* by the *direct* force of the Seventh Amendment to the Constitution of the United States and its intendiments? To *not* grant it would be an *alteration* of the Constitution?

2.

This Court in two authoritative decisions *Adickes v. Kress & Co.*, 398 U.S. 144, 159, 160 (1970) and *First National Bank v. Cities Service Co.*, 391 U.S. 253, 274, 288, 289 (1968) supra *plainly* held that F.R. Civ.P. Rule 56(e) as amended in 1963 *shifted* the burden of *going forward with the evidence* to *rebut* a *conclusive* showing under F.R. Civ.P. Rule 56(c) and does not *shift* the *burden of proof* which remains on the *moving* party under Rule 56(c).[10]

Therefore *may* the *Court* below on a motion for summary judgment by the *defendant* shift the burden of proof from the *moving* party to show *initially* the *absence* of a genuine issue of material fact to the *non-moving* party to show *initially* the *presence* of a genuine issue of material fact which in *effect* is what the Court below does, where in affirming summary judgment for the *moving* party it says, to wit:

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[10] *Adickes v. Kress & Co.* supra *expressly* held that the burden of proof is on the *moving* party under Rule 56(c) to show initially the absence of a genuine issue of material fact by evidence which is conclusive; *First National Bank v. Cities Service Co.* supra *expressly* held that Rule 56(e) placed on the *non-moving* party the burden of producing evidence which need not be conclusive *only* after the moving party had *met* the burden of proof. The Court further makes clear that a well pleaded allegation stated as a conclusion of the pleader grounded on a particular theory is conclusively disproved when the facts assumed to be contained in the theory are disproved. In *Cities Service Co.* the alleged conspiracy was grounded on Boycott. The Court considered the allegation as one of a conspiracy to restrain trade by Boycott.

"The *facts* are clearly insufficient to *establish* a prima facie violation of the Robinson-Patman Act",[11] in that the question is whether the *defendant* has conclusively *disproved* the allegations of the complaint and in order to *avoid* summary judgment the decision of the Court below requires that the record conclusively *prove* the allegations of the complaint and thus *shifts* the *burden of proof* to the *non-moving party* and not only requires that he show initially the *presence* of a genuine issue of material fact of discrimination under the Robinson-Patman Act but that he make out *proof* that there *is* discrimination contrary to the *plain* holding of this Court in two authoritative decisions?

3.

The following United States Courts of Appeal decisions in effect *shift* the *burden of proof* from the *moving* party to show *initially* the *absence* of a genuine issue of material fact to the *non-moving* party to show *initially* the *presence* of a genuine issue of material fact or prove the fact[12] when the *defendant* moves for summary judgment *contrary* to what this Court *decided* in *Adickes v. Kress & Co.*, 398 U.S. 144, 159, 160 (1970) and *First National Bank v. Cities Service Co.*, 391 U.S. 253, 274, 288, 289 (1968) supra:

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[11] Clayton Act, as amended by the Robinson-Patman Act, Section 2(b) specifically defines a prima facie violation of the Act as occuring upon *proof* being made that there is discrimination in price or services or facilities furnished.

[12] These decisions, on a motion for summary judgment by the *defendant*, either interpret the Amendment to Rule 56(e) literally,

BOBBY JOE CRAIG V. SUN OIL COMPANY, 515 F.2d 221, 224, 225 (*10th Cir.*) 1975 (App. A). "The *record* contains *nothing* which would relate to such an allegation . . . The *facts* are clearly insufficient to *establish* a prima facie violation of the Robinson-Patman Act."

HAHN V. SARGENT, 523 F.2d 461, 464, 468 (*1st Cir.*) 1975. " . . . For Rule 56 purposes a material issue must be *established* by sufficient evidence *supporting* the claimed factual dispute . . . a party against *whom* summary judgment is *sought* must . . . produce the requisite quantity of evidence to enable him to reach the jury with his claim."

BUSHIE V. STENOCORD CORPORATION, 460 F.2d 116, 120 (*9th Cir.*) 1972. "Bushie's . . . argument is that the agreement between Stenocord and Sconce constituted a conspiracy . . . the purpose of the agreement was to eliminate competition . . . we recognize . . . such . . . an agreement constitutes actionable conspiracy. However, *Bushie* failed *to produce proof* to *support* the conspiracy."

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that if the defendant supports his motion with affidavits or otherwise [regardless of content] the *burden of proof* shifts to the non-moving party or plainly misinterprets the holding of the Court in *Cities Service Co.* or apply the analogy to a motion for directed verdict which is invalid when the *defendant* is the moving party because the burden of proof is different. See Moores Federal Practice, Second Edition 56-480, 481. A *motion* for directed *verdict* by *defendant* raises the question of whether the *plaintiff* has

DAILY PRESS, INC. V. UNITED PRESS INTERNATIONAL, 412 F.2d 126, 135 (*6th Cir.*) 1969. "In our judgment there was an entire *failure* of proof on the monopoly issue."

STEVENS V. BARNARD, 512 F.2d 876, 878, 879 (*10th Cir.*) "*Stevens* bald allegation that the . . . other alleged acts constituted the *proximate* cause can rise no higher than a *potential* issue . . . *Stevens* has not presented any *evidence* that the other acts . . . were the *proximate* cause . . . *Stevens must 'necessarily' present evidence that the . . . acts complained of . . . were the proximate cause.*"

REID INTERNATIONAL UNION, 479 F.2d 517, 520 (*10th Cir.*) 1973. "In the record before us we find *no* facts *establishing* discrimination . . . ".

The following United States Courts of Appeal decisions do not do so:

BLOOMGARDEN V. COYER, 479 F.2d 201, 206, 207 (*Dist. Col.*) 1973. "The party *moving* for summary judgment bears the *burden* of demonstrating the *absence* of a genuine issue of any material fact and even where his *opponent* comes forward with *nothing* summary judgment

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failed to carry his burden of proof. *Failure* of *proof* is not *disproof.* A fact which is *not* proved can *still* be proved. A fact which is *disproved* cannot *still* be proved. A *motion* for *summary judgment* by the *defendant* raises the question of whether the disputed allegations of the complaint are *abolished* not *established* or *supported.*

should be denied if the facts supporting the motion do not *establish* the *nonexistence* of such an issue" (cites Adickes v. Kress & Co. supra).

WINDSOR V. BETHESDA GENERAL HOSPITAL, 523 F.2d 891, 893, 894 (*8th Cir.*) 1975. "In order to meet . . . [the] burden of demonstrat[ing] . . . the *absence* of a genuine issue remaining for trial . . . *defendants* would have to demonstrate *conclusively* that Windsor was *not* discriminated against." (cites *Adickes v. Kress & Co. supra).*

SWEET V. CHILDS, 507 F.2d 675, 679 (*5th Cir.*) 1975. "The Fifth Circuit consistently follows the *Adickes v. Kress* analysis of Rule 56(e) that once *movant* carries his *burden of proof* showing *no* genuine issue of material fact it is *non-movant's* burden to *rebut* that showing."

Is not uniformity under the *authoritative* decisions of this Court essential?

4.

The Trial Court found[13] and the Court below agreed[14] that "Sun Oil Company offered the *same* services[15] to plaintiff and Claiborne[16] (Davis Deposition p. 80, 81)"; and the "plaintiff did not *accept* or *desire* any assistance other than credit (Willis Craig Deposition p. 117, 118)."

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[13] Appendix B, numbered pages A-10 and A-13.

[14] Appendix A, numbered pages A-3 and A-8.

[15] This concerns numbered para. 2 and 13 of the Amended Complaint (R p: 6, 7, 8) 15 U.S.C.A. Sec. 13(b), (d) and (e) inter alia

(a) In finding as a material fact "that Sun Oil Company *offered* the *same* services to plaintiff and Claiborne" the Court is *relying* on the deposition testimony of W. K. Davis an *employee*[17] of Sun Oil Company in part as follows, to wit:

> Q: Was there any difference in the degree of use of your services made by for example Mr. Craig and Mr. Claiborne?
>
> A: As I recall in all honesty Bobby Joe Craig called on me more frequently than Claiborne did.
>
> Q: And did you *comply* with that request on his part?
>
> A: *Yes sir.* (Davis Deposition R. p. 80)

This is *directly* contradicted by the deposition testimony of Bobby Joe Craig as follows, to wit:

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pertaining to discrimination in *services* under the Clayton Act as amended by the Robinson-Patman Act, Sec. 2(b), (d) and (e). (d) refers to services furnished by the *customer*; (e) refers to services furnished by the *supplier.* (App. N)

[16] Claiborne [respondent] and Bobby Joe Craig [petitioner] held *identical* DX TBA *Distributor* Agreements for *Firestone* products from Sun Oil Company (App. F) from May 5, 1969 through February 1970 (Davis Deposition R. p. 22; Don Brewer 1st Deposition R. p. 17) at which time Craig went out of business; a DX TBA *Distributor* is defined as a marketer engaged in *wholesaling* of TBA products . . . whose TBA marketing will consist in *substantial* part in *supplying* other DX *accounts* under the applicable written policy of Sun Oil Company (App. C, I C.) which Don Brewer helped to write (Don Brewer 2nd Deposition R. p. 7) which further states "these *distributors* will serve as *supply* points

Q: Did you ask them to come out and give you help in any respect whatsoever?

A: At various times, and a couple of times, yes different times.

Q: Who did you ask?

A: Mr. Davis.

Q: Did he fulfill his obligations to you to your satisfaction?

A: *He never did fulfill it* (Bobby Joe Craig 1st Deposition R. p. 89, 90, 91).

and in part as follows, to wit:

Q: So after Mr. Craig opened his doors out there at Claiborne's old location what was your *function* as TBA Area Manager insofar as Mr. Craig was concerned in operating that business?

A: I called on him—my duties were to call on him regularly, work with him on his inventory practices, advise him of special buys. I would say the normal duties of a salesman client set up.

Q: Did you in that capacity have any *contact* with the *service station* dealers independent service station dealers themselves?

A: *No.*

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for *DX dealers* (App. C, I C. para. 6) and defines a *DX Dealer* as a *petroleum* marketer . . . who markets TBA products *essentially* at *retail* (App. C, I B.), its service station dealers; and there were roughly "90" such service stations within the city limits of Tulsa, Oklahoma (Davis Deposition R. P. 12) who did $6,000.00 a month [average] wholesale *tire* business with Claiborne previous

Q: Did you Mr. Davis or anyone else in Sun Oil Company that you are aware of *contact* the individual *service station* proprietors relative to the services that could be obtained from any distributor?

A: *No Sir.*

Q: Were there any of those services, Mr. Davis that you afforded Mr. Claiborne that you did not afford Mr. Craig?

A: *No Sir, absolutely not.* (Davis Deposition R. p. 39, 40, 81, 80)

In regard to whether Mr. W. K. Davis would have had any *contact* with the *service station* dealers themselves, which he has *denied,* Mr. Don Brewer refers to the Area TBA Manager as a *TBA specialist* (Don Brewer 2nd Deposition R. p. 4). The written policy of Sun Oil states as follows, to wit:

> The DX sales organization is staffed with *TBA specialists* who will offer sales assistance to *dealers* and distributors. In addition to direct selling this includes merchandising, advertising, and sales promotion. (App. G, I C. Para. 5)

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to May 5, 1969 when Craig became a distributor (App. F) as represented to Bobby Joe Craig by Claiborne (Bobby Joe Craig 2nd Deposition R. p. 147, 148). TBA means tires, batteries and accessories (Don Brewer 1st Deposition R. p. 4).

[17] W. K. Davis was Area TBA [Sales] Manager for Sun Oil company whose immediate supervisor was Don Brewer who was Division TBA Manager and the *basis* of the TBA *Department* of Sun Oil Company was to *make available merchandise to DX service stations* (Davis Deposition R. p. 29, 30, 11). See Organization Chart (App. H).

Q: I don't know who would be responsible for the things suggested, I thought you said Mr. Bill Davis might be?

A: Speaking from that frame of reference, I would say . . . that *Mr. Davis* could have assisted them in sales knowledge and training of their employees, the merchandising of *service stations* and by some advertising. (Don Brewer 2nd Deposition R. p. 34, 35)

In regard to whether Mr. W. K. Davis was *aware* that anyone else in Sun Oil Company would have had *contact* with the individual *service station* proprietors relative to the services that could be obtained from any distributor which he *denied* and in regard to whether any such services were *afforded* Mr. Claiborne that were not *afforded* Mr. Craig, which he in effect *denied,* Mr. Bill F. Pope an employee[18] of Sun Oil Company testified as follows, to wit:

Q: What kind of *functions* would you have with Mr. Claiborne, Mr. Pope . . . ?

A: The only thing I would try to do is *promote* TBA sales through *stations* and Bill Claiborne was a *supplier.*

Q: Do you ever remember suggesting to Mr. Clyde Dowell that he use Mr. Claiborne's facilities to buy his tires, batteries and accessories?

A: I don't think I ever specifically mentioned a

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[18] Mr. Pope was the Area [sales] Manager for Sun Oil Company with *four* salesmen working under his jurisdiction in Tulsa, Oklahoma from May 1969 to February 1970 (Bill Pope Deposition R. p. 7, 38) See Organization Chart (App. H) supra.

name. We did sanction Firestone . . . and I possibly did tell, I'm *sure* I told *every* dealer who the Firestone dealer was . . .

Q: Your job was to help service *stations* and see they got the *products* for their *customers* is that right?

A: That's correct. (Bill Pope Deposition R. p. 12, 43, 44)

Q: Did you know Mr. Pope whether or not there was more than *one* Firestone jobber?

A: I don't recall there ever being anybody but *one* just *one.*

Q: Was that Mr. Claiborne?

A: *Yes.* (Bill Pope Deposition R. p. 31)

Q: Do you know Mr. Davis with Sun Oil Company?

A: W. K. Davis?

Q: Yes.

A: Yes, I know him.

Q: Are your duties *similar* to what his are, or do you know?

A: *Similar, yes.* (Bill Pope Deposition R. p. 5)

The testimony of Mr. W. K. Davis in effect that he was not *aware* of the functions performed by Bill F. Pope for Sun Oil Company as Area [sales] Manager is incredible and it is *patent* that direct sales assistance at the DX Dealer level [service stations] was *afforded* Mr. Claiborne that was not *afforded* Mr. Craig.

Mr. W. K. Davis further characterized his functions as follows, to wit:

Q: . . . would you tell me, Mr. Davis, what was your function and responsibility as a TBA Area Manager?

A: To—basically it was to find and develop franchise accounts for DX in an assigned area, to work and advise with these people from an *inventory* [19] stand point, business philosophies; such as this.

The record shows that Mr. Claiborne was *afforded* an initial *investment free* inventory [20] of $25,000 of tires. In this regard the affidavit of Bobby Joe Craig filed under F.R. Civ. P. 56(e) states as follows, to wit:

> "I was never *told* that Sun *could* or *would* finance my $25,000 initial tire inventory on a non-liquidating non-interest bearing demand note with an agreement not to demand payment on the note until after the close of the first years business."

This testimony from which it affirmatively appears that Craig would have personal knowledge *contradicts* the prior testimony by W. K. Davis *supra,* to wit:

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[19] Appendix I 2. describes the *inventory ledger balance plan* of Sun Oil Company. It provides that when local financing cannot be obtained to finance an adequate inventory and competitive conditions warrant the plan may be used to *offer* financial aid to TBA *Distributors* or Jobbers . . . for *tires* and tubes only. Two plans, a *liquidating* and *non-liquidating* basis, are available. *Interest* is to be *charged* on *both* plans. The liquidating plan is in 60 equal installments. *Both* plans are *only* for *larger* Distributors or Jobbers. Credit approval is required. Both Claiborne and Craig were approved for credit on *May 12,* 1969, Craig for $12,000 per month and Claiborne for either $8,000 or $12,000 per month. (Jacky Carrol Fehrenbacher Deposition R. p. 21, 31)

Q: Were there any of *those* services, Mr. Davis that you afforded Mr. Claiborne that you did not afford Mr. Craig?

A: *No Sir, absolutely not.*

(b) In finding as a material fact that the *plaintiff* did not *accept* or *desire* any assistance other than credit the Court is *relying* on the deposition testimony of Willis Craig the *brother* of Bobby Joe Craig with reference to the conduct of the business after *October 14,* 1969, as follows, to wit:

Q: About October 14 or 15 he came out there did he make a stop?

A: Yes.

Q: What did you ask him?

A: I told him that we had to have some credit.

Q: Did you need any help besides credit help?

A: No *I* didn't need any help.

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[20] The record shows that on *May 7,* 1969 Craig obtained an inventory of $18,750.00 under the Inventory Ledger Balance Plan of Sun Oil Company supra (App. I) on the *liquidating* basis of 60 equal monthly installments at 8 percent interest and that on *May 12,* 1969 Claiborne obtained an inventory of $25,000 under this plan on a *non-liquidating* basis with *no interest and no obligation whatsoever until May 1, 1970* which is two months after

Q: You didn't need any help so far as running the business?

A: *I* didn't need any help. *I* didn't need them tell-me how to run *my* [21] business.

Q: Does this hold true from May 1969 on?

A: Yes.

Q: So the only help *you* asked for was credit help?

A: Yes. (Willis Craig Deposition R. p. 117, 118)

This is *directly* contradicted by other deposition testimony of Willis Craig, as follows, to wit:

Q: What was discussed about business help to Empire 2 at that first meeting?

A: Well, about the business and Brewer asked Bobby if he was aware of the kind of business that Bill was doing and if he was satisfied with the figures Bill gave him, and to—*if he could help us like they had been helping Bill,* why then we would be glad to go along with it.

Q: How were they helping Bill?

A: Well, credits helping him with the service stations, *calling on service stations for him.*

Q: Did you ask specifically if they would give you that help?

A: *Sure.*

Q: And you said, will you help us go out to the service stations?

A: *Right.*

Q: Who told you they were doing that?

A: I didn't have to be told. I saw them in the stations, I knew that. [22] (Willis Craig Deposition R. p. 63, 64)

and in *direct* contradiction to the *finding* by the Court that "the *plaintiff* did not *accept* nor *desire* any assistance other than credit" *based* on the deposition testi-

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Craig went out of business. The instruction to set this up is marked—destroy—in two places but was by chance discovered. On *May 12,* 1969 Claiborne obtained an *additional* $25,000 inventory of tires on the *liquidating* basis of 60 equal installments at 8 percent interest (App. K and L). Between May 5, 1969 and May 24, 1969 Craig purchased an additional $19,000 of tires from Sun Oil Company (Jacky Carrol Fehrenbacher Deposition R. p. 42) Appendix M is an excerpt from the testimony of Don Brewer where he is asked to but does not reveal the initial *investment free* $25,000 inventory *afforded* Claiborne. This failure of Don Brewer to reveal the *investment free* inventory of $25,000 and the failure of *W. K. Davis* to reveal the *functions* of the Area [Sales] Manager, Bill F. Pope, *supra* both under oath, smack of the type of *secret* discriminations the Clayton Act, as amended by the Robinson-Patman Act, sub-sections (b)(d) and (e) was *designed* to prevent. See *Federal Trade Com. v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959).

[21] Bobby Joe Craig was the *sole* owner of the business and Sun Oil Company knew that (Don Brewer Deposition 1st, R. p. 8, 13, 26; Bobby Joe Craig 2nd Deposition R. p. 99, 105, 108). On October 15, 1969 he made a *contract* with his brother Willis Craig who was just to get paid for *working* in the business and not to

mony of Willis Craig, *is* the deposition testimony of W. K. Davis *supra* as follows, to *wit*:

> Q: Was there any difference in the degree of use of your services made by for example Mr. Craig and Mr. Claiborne?
>
> A: As I recall in all honesty Bobby Joe Craig called on me more frequently than Claiborne did.

W. K. Davis and Willis Craig are *key* witnesses on the *issue* of discrimination in services. The testimony of the former is *contradicted* by Bobby Joe Craig, Don Brewer, Bill F. Pope and written company policy. The latter *contradicts* his own testimony and is further contradicted by Bobby Joe Craig.

This Court said in *First National Bank v. Cities Service Co.*, 391 U.S. 253, 304 supra Mr. Justice Black speaking for the dissent:

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manage it. He worked in the business *full* time previous to this for *two* weeks while Bobby Joe Craig finished two weeks notice to his employer other than that he *worked* in the business occasionally without compensation (Bobby Joe Craig 1st Deposition R. p. 112) For the Court to take this testimony of Willis Craig as *positive* evidence that the *plaintiff* did not accept or desire any help besides credit does *violence* to the principal laid down by this Court in *United States v. Diebold*, 369 U.S. 654 (1962) that on a motion for Summary Judgment the evidence is to be construed in the light most favorable to the non-moving party.

[22]The business of Bobby Joe Craig was referred to as Empire 2 (Bobby Joe Craig 2nd Deposition R. p. 111). This testimony by Willis Craig is in direct reference to the *type* of functions described by Bill F. Pope *supra* and seeks assurance from Don Brewer that if Bobby Joe Craig became a DX TBA Distributor that Sun Oil Company would perform the *same* services for him at the DX Dealer level that they had been performing for Claiborne. This was not done and he did not get any DX Dealer business. He had sufficient capital to carry the business five or six months without the DX Dealer business. By October 15, 1969 he was in a loss position. (Bobby Joe Craig 1st Deposition R. p. 116, 118, 121)

> "The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases thus depriving parties of their right to a trial by jury."

Is this not precisely what the Court below has done in this case when it procedes to *weigh* the *contradicted* evidence of the *key* witnesses? Is it not an important duty of this Court to see that parties are not, in effect, unconstitutionally deprived of the right to a trial by jury by the *improper* application of Rule 56?

5.

The *Court* below *held* with respect to the Sherman Act Section 1, that

> "The *essence* of the complaint is that Claiborne and Sun conspired to set him [Petitioner] up as an additional distributor for the purpose of making it practical for him to finance Claiborne in a new outlet and that once that purpose was achieved, *Claiborne and Sun continued to conspire to destroy his business by means of price, credit and service discriminations in favor of Claiborne*", and
>
> "Thus the conspiracy alleged was to induce plaintiff to buy, to use the money to start Claiborne at a

new place, *and then for defendants to drive plaintiff out of business by price, credit, service and facilities discrimination''*, and

"The *in* and *out* of plaintiff had no impact on the competitive situation and was not actionable under the antitrust theory of plaintiff's case."[23]

The *Court* below has held in effect that because part of an alleged conspiracy to restrain trade under the Sherman Act is *not* actionable the other *part* is *not* actionable even though it would be if proceeded upon alone. Can this possibly be the law?

The *Court* below *held* with respect to the Robinson-Patman Act, that discrimination in credit is not actionable as a matter of law.[24] Was the court correct in this regard?

STATUTES AND REGULATIONS INVOLVED

1.

Clayton Act, 15 U.S.C.A. Section 13(b), (d) and (e), October 15, 1914, C. 323, Section 2,38 Stat. 730, as amended by the Robinson-Patman Act, June 19, 1936, C. 592 Section 1, 49 Stat. 1526 Section 2(b), (d) and (e) respectively: (App. O-1)

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[23] App. A numbered pages A-3, A-4, A-6. Also see Note 1. numbered para. 2 and 13 of the Amended Complaint as set out in App. N.

[24] The court held that "the trial court concluded that discrimination in credit terms as *alleged* could not as a matter of law be the basis for a claim under the Robinson-Patman Act under U.S.C. 13 (a) or (e);" App. A, A-7.

2.

Amendment 7 Constitution of United States. (App. O-2)

3.

Federal Rules of Civil Procedure, Rule 38. Jury Trial of Right, as amended Feb. 28, 1966, eff. July 1, 1966: (App. O-3)

4.

Federal Rules of Civil Procedure, Rule 56. Summary Judgment, as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jn. 21, 1963, eff. July 1, 1963: (App. O-4)

5.

Federal Rules of Civil Procedure, Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings, as amended Jan 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966: (App. O-5)

6.

Sherman Act, Section 1, Trusts, etc., in restraining of trade illegal; exception of resale price agreements; penalty, July 2, 1890, C. 647, Section 1, 26 Stat. 209; Aug. 17, 1937, C. 690, Title VIII Stat. 693; July 7, 1955, C. 281, 69 Stat. 282: (App. O-6)

7.

Clayton Act, Section 4 (October 15, 1914, C. 323 Section 4, 38 Stat. 731, 15 U.S.C. Section 15): (App. O-7)

STATEMENT OF THE CASE

The Court of Appeals had jurisdiction under 28 U.S. C. 1291 and 1294(1) of the appeals from the District Court for the Northern District of Oklahoma. The District Court had jurisdiction of the complaint under 28 U. S.C. 1337 and 4 of the Clayton Act (15 U.S.C. Sec. 15). There is direct evidence of facts material to the questions presented for review herein as set out below.

The defendant Claiborne [respondent] held a DX TBA Distributor Franchise Agreement from Sun and a DX Dealer Agreement. Tire sales by Claiborne were at wholesale to other DX Dealers and retail. At the insistance of Sun in the person of Don Brewer, Division TBA Manager, Claiborne sold his business to Bobby Joe Craig [petitioner]. As an incident thereof Sun in the person of Don Brewer issued Bobby Joe Craig a DX TBA Distributor Franchise Agreement and a DX Dealer Agreement of some kind on May 5, 1969. Sun and Claiborne remained silent about their plans for Claiborne to open a new DX TBA Distributor location to supply tires to DX Dealers in Tulsa, Oklahoma on June 1, 1969 so that plaintiff would buy the business of Claiborne for the amount needed to pay Claiborne's existing debt to Sun of $52,000 so Don Brewer could get Claiborne financed by Sun in the new location. Claiborne sold the business on the pretext that he was going out of the tire business altogether and sell only parts.

Craig would not have purchased the business unless Sun made him a DX TBA Distributor as he predicated the payout of the business on the wholesale tire business

with DX Dealers in Tulsa. Claiborne retained his DX TBA Distributor Agreement and on May 5, 1969 petitioner and respondent [Claiborne] began competing for DX Dealer tire business though this was not yet known to petitioner. On May 12, 1969 Sun provided Claiborne with an investment free inventory of $25,000 of tires, direct sales assistance at the DX Dealer level, business consulting services and a sales projection and cash flow forecast for June 1, 1969 to June 1, 1970 and did not make any of this available to Craig. The DX Dealers receive an annual bonus based on net tire purchases from the DX TBA Distributor and with the efforts of the Sun sales force at the DX Dealer level directed toward Claiborne, only, Craig did not get any DX Dealer business and went into a loss position on October 15, 1969 and went out of business in February 1970. About the time he discovered Claiborne was going to stay in the DX TBA Distributor business, a substantial mixed shipment of tires from Kansas City came to him, part had been ordered by Claiborne and part had been ordered by him, and the invoices showed he was being charged a *higher* price for the *same* tires on a different *discount* structure and he declined to pay this initial invoice until Sun gave him the *same* price and Sun cut his credit off after demanding an additional $5,000 for tire purchases not yet due. Don Brewer made the demand. Craig subsequently received a credit memo reducing the invoice price to the same price as Claiborne but though he asked *never received an explanation of the price difference* and though he then paid the invoice his credit was never restored.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1.

The *proper* application of F.R. Civ.P. Rule 56 does not unconstitutionally *deprive* the party against whom it is rendered of the right to a jury trial and promotes the *efficient* administration of justice. The *improper* application of F.R. Civ.P. Rule 56 may in effect unconstitutionally *deprive* the party against whom it is rendered of the right to a jury trial and promotes the *inefficient* administration of justice. The question of what is a *proper* application of Rule 56 is therefore of *general* importance in the appropriate administration of our system of Federal Jurisprudence.

2.

The Circuit Court of Appeals has *failed* to *apply* an important and authoritative decision of this Court in *Poller v. Columbia Broadcasting System* 368 U.S. 464,473 (1962), that on a motion for summary judgment by defendant under F.R. Civ.P. Rule 56 that an *additional* claim stated in a civil antitrust complaint in the form of the conclusion of the pleader that is *disputed* under the *pleadings* but with *no* evidence in the record to support it *creates* a genuine issue for *trial* which *prevents* the entry of summary judgment against the plaintiff.[25]

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[25] In the case at bar there *is* a genuine issue for trial of discrimination in *facilities*. See Questions Presented For Review 1.

3.

The Circuit Court of Appeals has *failed* to *apply* an important and authoritative decision of this Court in *Adickes v. Kress & Co.* 398 U.S. 144,159,160 (1970), that on a motion for summary judgment by the *defendant* under F.R. Civ.P Rule 56(c) the *burden of proof* is on the *moving* party to show *initially* the *absence* of a genuine issue for trial and even though the plaintiff comes forward with *nothing,* that summary judgment may *not* be entered against the plaintiff[26] unless the *defendant* has carried his burden of proof.

4.

The Summary Judgment does not mention facilities. The finding of the Circuit Court of Appeals is tantamount to an *express* finding that there is discrimination in furnishing facilities which is within the *exclusive province of the jury* to decide. It is respectfully submitted that this is a novel Seventh Amendment question for which the Court should grant Certiorari under 28 U.S.C.

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supra. This case decided in 1962 would be the *normal* standard applicable to summary judgment as referred to in the Advisory Committee Notes on the 1963 Amendment to Rule 56(e) recited by the Court in the ensuing case of *Adickes v. Kress & Co.*

[26] In the case at bar there is a genuine issue for trial of discrimination in *facilities*. See Questions Presented For Review 1.(a). At page 159 the Court cites the Advisory Committee Note on the 1963 Amendment to Rule 56(e) that "the changes were not designed to affect the *normal* standards applicable to the summary judgment.

1254 (1) in that it is the proper and important business of this Court to preserve inviolate the limitation imposed by the Seventh Amendment that the ultimate determination of issues of fact by the jury be not *interferred* with and to not do so would permit an *obvious* interference.[27]

5.

The Circuit Court of Appeals failed to *apply* the important and authoritative decision of *Adickes v. Kress & Co.* 398 U.S. 144,159,160 (1970) and plainly *misinterpreted* the important and authoritative decision of *First National Bank v. Cities Service Co.* (1968) 391 U.S. 253, 274, 288, 289 (1968) *supra* in that the decision of the Circuit Court of Appeals in effect *shifts* the *burden of proof* from the *moving* party to show *initially the absence*[28] of a genuine issue of material fact to the *non-moving* party to show *initially* the *presence*[29] of a genuine issue of material fact[30] or prove the fact[31] *when the defendant* moves for summary judgment *contrary* to what this Court has decided.

6.

An absolutely *square* conflict exists between *four* Circuit Courts of Appeal whose *decisions* in effect *shift* the *burden of proof* from the *moving* party to show *initially* the *absence* of a genuine issue of material fact to the

[27] See Questions Presented For Review 1. (b) supra.
[28] See Questions Presented For Review 2. and note 10 supra.
[29] See Questions Presented For Review 2. and note 10 supra.
[30] Genuine issue for trial.
[31] *Cities Service Co.* held that evidence produced by the non-moving party need *not* be conclusive [note 10 supra].

non-moving party to show *initially* the *presence* of a genuine issue of material fact or prove the fact when the *defendant* moves for summary judgment, *contrary* to what this Court decided[32] and *three*[33] Circuit Courts of Appeal whose *decisions* in effect do *not* do so, which a *decision* by this *Court* will remove. It follows that a *square* conflict *also* exists between the *four* Circuits that *improperly* shift the *burden of proof* and the applicable *decisions of this Court.*[34]

It is the proper and indispensible function of this Court to secure harmony under these two important and authoritive decisions.

7.

The Trial Court and the Circuit Court of Appeals have *weighed* the *contradicted* evidence of *key* witnesses *after* lifting the *burden of proof* from the shoulders of the *defendant* where it belongs and putting it down on the shoulders of the *plaintiff* where it does not belong, on a

[32] *Adickes v. Kress & Co.* and *First National Bank v. Cities Service Co.* supra. The former is a *civil* rights case, the latter is an antitrust case. It is *assumed* that these broad *principles* of administration *necessarily* apply to other type cases. In any event the Tenth Circuit *improperly* shifts the burden of proof *consistently* in antitrust cases and a negligence case cited; the Ninth and Sixth Circuit decisions cited are *antitrust* cases; the First Circuit decision cited is a *civil* rights case. See Questions Presented For Review 3. and note *12* supra.
[33] The decisions cited for these circuits *properly* apply *Adickes v. Kress & Co.*; one is a suit for finder's fee, the other two are civil rights cases. See Questions Presented For Review 3. supra.
[34] See note 32.

motion for summary judgment by the *defendant*, and has considered the *burden of proof* to be the same as if a *case* were being *tried* to the *Court* contrary to the *admonition* of Mr. Justice Black, The Chief Justice, and Mr. Justice Brennan, [stated in the dissent of the *First National Bank v. Cities Service Co.* case supra] that,

> "the summary judgment technique tempts judges to take over the jury trial of cases thus depriving parties of their constitutional right to a trial by jury."

It is a proper and indispensible function of this Court to *insure* that the *improper* application of Rule 56 does not have the *effect* of depriving parties of their constitutional right to a trial by jury. The responsibility of this Court is multiplied where the private enforcement of antitrust laws through treble damage actions is involved.

CONCLUSION

In conclusion, it is respectfully submitted that the issues herein involved warrant full consideration by this Court, in that they involve a square conflict with authoritative decisions of this Court, which has resulted in the impairment of uniformity of decision by the United States Courts of Appeal, in regard to matters of general importance and the continuing interest of this Court, that justice be not obscured by the summary judgment technique in our Federal System of Jurisprudence.

A writ of certiorari should be granted to review the decision of the United States Court of Appeals affirming

the decision of the District Court, and upon review should be reversed.

Respectfully so prayed,

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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1310

BOBBY JOE CRAIG
Appellant

v.

SUN OIL COMPANY OF PENNSYLVANIA,
and WILLIAM R. CLAIBORNE
Appellees

Appeal From The United States District Court
For The Northern District of Oklahoma
(D.C. #73-C-145)

Ray Painter, Jr., Tulsa, Oklahoma (Jack R. Givens, and Jones Givens Brett Gotcher Doyle & Atkins Inc., Tulsa, Oklahoma, with him on the Brief), for Appellant.

Jon A. Baughman, Philadelphia, Pennsylvania (John J. Runzer, Philadelphia, Pennsylvania, Robert M. Dubbs, St. Davids, Pennsylvania, and John A. Ladner, Tulsa, Oklahoma, with him on the Brief), for Appellee, Sun Oil Company of Pennsylvania.

Booth & Jay, and Frank R. Hickman, Tulsa, Oklahoma, on the Brief for Appellee, William R. Claiborne.

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

SETH, Circuit Judge.

This is a private action under the Sherman Act seeking treble damages against Sun Oil Company of Pennsylvania and William R. Claiborne. The trial court granted motions of the defendants for summary judgment at the conclusion of discovery and after the filing of affidavits by plaintiff in response to the motions.

The defendant Claiborne held a distributorship franchise from Sun, and sold tires, batteries, and accessories pursuant thereto from a filling station in Tulsa. The tire sales by Claiborne were at retail to his station customers and at wholesale to other Sun stations and fleet owners. He sold this station to the plaintiff in May 1969, and plaintiff was given a franchise by Sun. Claiborne then began business under a Sun franchise from another location. This suit centers on this sale and subsequent relationships between Sun, plaintiff, and Claiborne. As mentioned, defendant Claiborne, after his sale to plaintiff, began a wholesale tire distributorship from a warehouse in Tulsa. This enterprise was financed for the most part by Sun. It was operated under the same type of contract with Sun as plaintiff had and Claiborne had before. There were in Tulsa and vicinity at least one or two other similar distributorships at all pertinent times.

The sale of the Claiborne station to plaintiff involved Sun in that it approved the new franchise to plaintiff for tires, batteries, and accessories, and it also financed for plaintiff equipment and machinery at the station. Part of the sale price was applied on debts which Claiborne owed to Sun, and the part for good will concerned only

plaintiff and Claiborne. By February 1970 plaintiff's business had failed, he was in default on notes to Sun, and Sun began suit, and took possession of the equipment.

The essence of plaintiff's complaint is that Claiborne and Sun conspired to set him up as an additional distributorship for the purpose of making it practical for Sun to finance Claiborne in the new outlet, and that once that purpose was achieved Claiborne and Sun continued to conspire to destroy his business by means of price, credit, and service discriminations in favor of Claiborne.

With respect to conspiracy to restrain trade under 15 U.S.C. § 1, the trial court concluded that even if such claim was supported in fact, which it found was not, a conspiracy which does not decrease competition or the number of competitors, or which replaces one distributor with another, is not actionable under the Sherman Act.

With respect to attempt or conspiracy to monopolize under 15 U.S.C. § 2, the court concluded the complaint made no allegations supporting a claim thereunder.

As to price, service, or credit discrimination under 15 U.S.C. § 13, the court found the only fact situation possibly involving price discrimination was a subsequently corrected mechanical error in a billing; it found that the same services were available to plaintiff and Claiborne alike, but that plaintiff neither accepted nor desired any assistance other than credit; and that discrimination in terms of credit does not as a matter of law violate the Robinson-Patman Act.

The allegations of plaintiff relating to the inducements for him to purchase Claiborne's station are that Claiborne represented that he was "getting entirely out of the tire business," and that plaintiff believed this and Sun knew about it. The plaintiff then alleges that the defendants used the proceeds of the sale to set up Claiborne at his new place of business to compete with plaintiff. Thus the conspiracy alleged was to induce plaintiff to buy, to use the money to start Claiborne at a new place, and then for defendants to drive plaintiff out of business by price, service, and facilities discrimination. The plaintiff in his complaint does not refer to any monoply nor to any relevant markets; in fact, neither of the terms appear in the complaint. Two references are made in the complaint to 15 U.S.C. § 2, but are conclusionary only, and were stricken by the trial court. We agree that there are no allegations which can be taken as asserting a violation of 15 U.S.C. § 2.

The plaintiff is very specific that only a cause of action for an antitrust violation has been alleged, and that there is only one conspiracy alleged.

We have held that a conspiracy which results merely in the substitution of one distributor for another does not violate 15 U.S.C. § 1. Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir.); Shotkin v. General Electric Co., 171 F.2d 236 (10th Cir.). *See also,* Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.). An increase in the number of distributors is not actionable under section 1.

Claiborne and Sun argue further that any fradulent misrepresentations by which they allegedly induced plaintiff's entry into the market are at best actionable as a business tort. We agree. Plaintiff, however, responds that if such a tort is not actionable under section 1, it is evidence, together with the later discrimination, of the overall conspiracy against him and that in any event conspiracy to restrain trade is a per se violation of section 1.

As to the per se violation argument, based on the allegation of a conspiracy to restrain trade, the plaintiff refers to Albert Pick-Barth Co. v. Mitchell Woodbur Corp., 57 F.2d 96 (1st Cir.); the later First Circuit case of Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879 (1st Cir.); to C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., 368 F.Supp. 501 (E.D.Pa.), and to our decision in Perryton Wholesale, Inc. v. Pioneer Distributing Co. of Kansas 353 F.2d 618 (10th Cir.). The attorneys at oral argument directed the court's attention to Whitten v. Paddock Pool Builders, Inc., _____ F.2d _____, First Circuit, No. 74-1169, December 17, 1974, which overruled *Albert Pick-Barth* and *Atlantic Heel.* We do not consider Perryton Wholesale, Inc. v. Pioneer Distributing Co. of Kansas 353 F.2d 618 (10th Cir.) to be applicable to this case, as the court was there concerned with a particular type of business activity which is not present here. Reference is made in the *Perryton* opinion to existing competition, and it is not necessarily a per se case despite the citation of the First Circuit cases.

The complaint, as to the purchase of the business,

alleges only a business tort, if anything, as noted above. The subsequent events alleged, and the facts used on the motion for summary judgment, show a series of events which in total amounted to no more than a substitution of distributors. The 'in and out' of plaintiff had no impact on the competitive situation, and was not actionable under the antitrust theory of plaintiff's case.

The complaint also contains allegations framed under the Robinson-Patman Act, assertions that the defendant Sun discriminated against plaintiff, as compared to Claiborne, during the relatively short period plaintiff was in business. Both were 'distributors' under franchise agreements with Sun. The record shows that defendant Claiborne was engaged in wholesaling tires, sold to him by Sun, from a warehouse. Plaintiff operated the filling station with facilities for retail sales and service of tires, batteries, and accessories, as well as gasoline and oil. Thus tires were only a part of his business. Plaintiff alleges he acquired no Sun service stations as tire customers for wholesale sales which he was franchised to make.

The allegations of plaintiff considered in this aspect of the appeal, of course, relate to the 'services' and 'facilities' provided by Sun, 15 U.S.C. § 13(e), and to price discrimination under 15 U.S.C. § 13(a), to include the granting of credit.

It is clear that the allegations of price discrimination are based upon several billing errors made by Sun, but which were corrected. The trial court reached the

same conclusion, and it would serve no useful purpose to detail the transactions. Similarly there is also no basis for any assertion of discrimination grounded on the handling of cash discounts, or the annual bonus plan.

The trial court concluded that although there may have been a dispute as to the facts relating to the credit terms and conditions arranged by Sun with Claiborne and those with plaintiff, this made no difference because the discrimination in credit terms as alleged could not, as a matter of law, be the basis for a claim under 15 U.S.C § 13(a) or (e). We agree with this conclusion.

It is obvious that difference in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit, security required, guarantees, and other devices used by creditors under these circumstances. *See* Rea v. Ford Motor Co., 497 F.2d 577 (3rd Cir.); Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir.); and Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F.Supp. 148 (D.Minn.), reversed on other grounds, 395 F.2d 388 (8th Cir.). We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme situation was alleged here by any means.

The allegations of the complaint relating to discrimination in the furnishing of facilities are conclusionary only. The record contains nothing which could relate to such an allegation. The allegations concerning the discrimination in the furnishing of services are somewhat

more specific.

Plaintiff asserts that Sun did not assist him by advice and counseling provided to others to help in soliciting customers, and for other business matters. The deposition of the plaintiff, however, demonstrates that he did not really know what advice or visits were to be expected. What he did expect by way of visits again related to the solicitation of the former customers of the station and his expectations as to competition from Claiborne. There is really no allegation of any specific way in which there was discrmination; there was thus nothing specific that plaintiff asserts was given others that he did not have available to him. Willis Craig, who managed the business for plaintiff for the first month and also during the period before it closed (in fact, for six out of the ten months the business existed), stated that he did not need any such help, that he did not ask for any. He said: "I didn't need any help. I didn't need them telling me how to run my business." It is apparent from the record that the plaintiff was disappointed in the amount of business he had, but there are no allegations of the specific discrimination, and his evidence shows advice was available but was not sought. We agree with the conclusions of the trial court as to this point.

The facts were clearly insufficient to establish a prima facie violation of the Robinson-Patman Act. The consequences described in FTC v. Simplicity Pattern Co., 360 U.S. 55, do not come about as the per se aspects were not brought into being.

There were no unresolved questions of fact relevant to the issues when the case is considered strictly as an antitrust action, as plaintiff on appeal asserts that it must be. Disposition by summary judgment under these rather unusual circumstances was proper. The complaint in the final analysis presented questions of law as to several issues, and as to the others, the facts developed left no unresolved questions under the applicable doctrines. *See*, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, and Bushie v. Stenocord Corp., 460 F.2D 116 (9th Cir.). Also there survives no cause of action under state law.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 73-C-145

BOBBY JOE CRAIG
Plaintiff

vs.

SUN OIL COMPANY OF PENNSYLVANIA
and WILLIAM R. CLAIBORNE
Defendants

SUMMARY JUDGMENT

This cause came on for consideration by the Court upon the defendants', Sun Oil Company of Pennsylvania and William R. Claiborne, Motions for Summary Judgment pursuant to Rule 56 Federal Rules of Civil Procedure.

The Court, having considered the depositions on file in this case and the written briefs of the respective parties in support of and in opposition to said Motions and upon due consideration and deliberation the Court is of the opinion that the issues have been reduced to material facts to which there can be no dispute and, therefore, summary judgment may be granted. *Zenith Vinyl Fabrics Corp. v. Ford Motor Co.*, 357 F.Supp. 133 (E.D. Mich. 1973).

The plaintiff contends that Claiborne told him he was completely getting out of the tire business and that Sun Oil Company was aware of this and that he relied heavily upon this in making his decision to purchase Claiborne's tire business. He further claims Claiborne and Sun Oil Company conspired to establish Claiborne in the tire business in a new location from which Claiborne could compete with the plaintiff, and that this conspiracy was in violation of the Sherman Antitrust Act, 15 U.S.C.A. §§ 1 & 2. The plaintiff further claims that Sun Oil Company gave Claiborne more favorable prices and credit terms than it gave to the plaintiff in violation of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. §13.

The Amended Complaint makes no allegations which will support a claim under 15 U.S.C.A. §2 for attempt to monopolize. Since no claim under 15 U.S.C.A. §2 is stated, the references to that section in paragraphs 2 and 5 of the Amended Complaint are stricken.

The plaintiff fails to state a claim under 15 U.S.C.A. §1. There is no evidence that Sun Oil Company conspired with Claiborne to withhold from Craig the fact that Claiborne would continue the wholesale tire business. The purchase agreement (Exhibit A, Amended Complaint), to which Claiborne and Craig, and not DX, were the only parties, limits Claiborne's obligation not to compete at the retail level only within a geographic area set forth therein. It is undisputed that Sun Oil Company personnel did not say anything to mislead the plaintiff

into thinking Claiborne was getting entirely out of the tire business (Bobby Joe Craig Deposition, 1st day, p. 96). The plaintiff admitted no one from Sun Oil Company was present when Claiborne allegedly stated that he was getting entirely out of the tire business (Bobby Joe Craig Deposition, 2nd day, p. 20). Willis Craig corroborated the plaintiff's testimony that Sun Oil Company's personnel had no knowledge as to the plaintiff's oral agreement with Claiborne, that Claiborne would get entirely out of the tire business (Willis Craig Deposition, p. 75-77).

As a matter of law the conspiracy which the plaintiff alleges does not violate the Sherman Act. Where the alleged conspiracy does not decrease competition or the number of competitors, no violation of the antitrust laws exists. *Parmelee Transp. Co. v. Keishin,* 186 F.Supp. 533 (N.D. Ill. 1960), *aff'd*, 292 F.2d 794 (7th Cir. 1961), *cert. denied,* 368 U.S. 944 (1961). Where one distributor is replaced with another, even though done pursuant to a conspiracy, there is no violation of the antitrust laws. *Joseph E. Seagram and Sons v. Hawaiian Oke and Liquors Ltd.,* 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Feddersen Motors v. Ward,* 180 F.2d 519 (10th Cir. 1950); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F.Supp. 824 (D.Md. 1938); *Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F.Supp. 1043 (S.D.N.Y. 1971).

The plaintiff has failed to state a claim for discrimination in prices, services or credit under 15 U.S.C.A.

§13. The pleadings, the briefs and the depositions reveal no facts to support allegations of price discrimination. The only factual situation that reveals any type of price discrimination was a mechanical error in a billing invoice which was subsequently corrected to the plaintiff's satisfaction (Bobby Joe Craig 2nd Deposition, p. 91-92). Sun Oil Company offered the same services to the plaintiff and Claiborne (Davis Deposition, p. 80-81). The plaintiff was not acquainted with the terms of his Sun Oil Company franchise (Bobby Joe Craig 1st Deposition, p. 97), but merely assumed that his services under the Sun Oil franchise would be similar to those services offered by OTASCO franches with which he was familiar (Bobby Joe Craig 1st Deposition, p. 89). The plaintiff did not accept nor desire any assistance other than credit (Willis Craig Deposition, p. 117-118). Although there may be factual controversy as to whether credit terms extended to the plaintiff were discriminatory, discrimination in terms of credit extended does not form the basis for violation of the Robinson-Patman Act. *Secatore's, Inc. v. Esso Standard Oil Co.,* 171 F. Supp. 665 D.Mass. 1959); *Rea v. Ford Motor Co.,* 355 F.Supp. 842 (W.D. Pa. 1973).

IT IS, THEREFORE, THE JUDGMENT of this Court that the Motions of the defendants, Sun Oil Company of Pennsylvania and William R. Claiborne, for Summary Judgment be granted and judgment be entered herein in favor of the defendants, at the cost of the plaintiff, and that the defendant, William R.

Claiborne's Cross-Complaint be dismissed without prejudice.

Dated this 18th day of April, 1974.

s/s Luther Bohanon
United States District Judge

APPENDIX C

MARCH TERM—APRIL 28, 1975

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges

No. 74-1310

BOBBY JOE CRAIG
Plaintiff-Appellant

vs.

SUN OIL COMPANY OF PENNSYLVANIA
and WILLIAM R. CLAIBORNE
Defendants-Appellees

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by tcounsel.

Upon consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, Clerk

s/s Howard K. Phillips

APPENDIX D

NOVEMBER TERM—JANUARY 14, 1976

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges

No. 74-1310

BOBBY JOE CRAIG
Plaintiff-Appellant

vs.

SUN OIL COMPANY OF PENNSYLVANIA
and WILLIAM R. CLAIBORNE
Defendants-Appellees

This matter comes on for consideration of the appellant's petition for rehearing received May 27, 1975. No mandate has issued in the captioned cause.

Upon consideration whereof, the petition for rehearing is ordered filed *nunc pro tunc* as of May 27, 1975. It is the further order of the Court that the petition for rehearing is denied.

s/s Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX E

Supreme Court of the United States

No. A-869

BOBBY JOE CRAIG,
Petitioner

V.

SUN OIL COMPANY OF PENNSYLVANIA and
WILLIAM R. CLAIBORNE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 13, 1976.

/S/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of April, 1976.

Supreme Court of the United States

No. A-869

BOBBY JOE CRAIG,

Petitioner

v.

SUN OIL COMPANY OF PENNSYLVANIA and
WILLIAM R. CLAIBORNE

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including May 26, 1976.

/S/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 3rd
day of May, 1976.

Supreme Court of the United States

No. A-869

BOBBY JOE CRAIG,

Petitioner

v.

SUN OIL COMPANY OF PENNSYLVANIA and
WILLIAM R. CLAIBORNE

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including June 7, 1976.

/S/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 18
day of May, 1976.

APPENDIX F

TBA FRANCHISE AGREEMENT

SUN OIL COMPANY-DX DIVISION

SDIX-3006-A

TBA DISTRIBUTOR FRANCHISE AGREEMENT

THIS AGREEMENT, made and entered into by and between Sun Oil Company - DX Division, hereinafter referred to as "Company," and Bobby Joe Craig - DBA - Empire Tire Co. #2 hereinafter referred to as "Distributor",

WITNESSETH:

WHEREAS, Company is engaged in the business of manufacturing and marketing petroleum products, and sells such petroleum products to certain parties, including independent station dealers, for resale; and

WHEREAS, Company believes that the ability of its independent service station dealers to compete in the marketing of petroleum products will be increased if nationally advertised brands of tires, batteries, tubes, automotive accessories and supplies, hereinafter referred to as "TBA", are made available to them for resale at competetive prices; and

WHEREAS, Company desires to make available to its independent service station dealers nationally advertised brands of TBA at competitive prices and with prompt delivery service; and

WHEREAS, Distributor is willing to solicit sales at competitive prices and deliver promptly TBA merchandise to independent service station dealers; and

WHEREAS, Distributor hereby makes application to Company for a Distributor Franchise Agreement subject to the following terms and conditions and subject to acceptance and approval by a Marketing Department Division Manager of Company.

NOW, THEREFORE:

1. In consideration of the premises and of the benefits moving from each party to the other, Company hereby gives and grants to Distributor this Franchise Agreement to purchase from Company the nationally advertised brands of TBA manufactured or distributed by Cooper Tire & Rubber Co., hereinafter referred to as "supplier", at prices established by Company from time to time. The prices for all such merchandise shall be subject to change without prior notice to Distributor. Company agrees to sell and to cause to be delivered such TBA merchandise as Distributor may order from time to time, from the supply points which Company may designate. Distributor, by executing this Franchise, does not obligate himself to purchase and resell any or all of the items of TBA merchandise covered hereby but only such items as Distributor may, from time to time, desire to purchase and resell, and which are offered for sale by Company from time to time.

2. Distributor shall maintain an adequate sales force to solicit orders from DX branded independent service station dealers; and shall maintain adequate delivery equipment and shall stock sufficient quantities of each item of TBA merchandise it elects to purchase hereunder, to insure prompt delivery service. Distributor shall furnish monthly to Company dollar totals of tires and tube, batteries, and accessories purchased from Company which were sold during the prior month to each DX branded independent service station dealer. It is not the intent of this Agreement to restrict Distributor to selling only to DX branded dealers, or to permit the Distributor to represent himself as the exclusive supplier of such TBA merchandise to DX branded independent service station dealers.

3. If Distributor elects to purchase and resell tires and/or batteries purchased from Company, he shall render the tire and/or battery service necessary to customers, including the handling, according to established Company policies and procedures, of tire and/or battery returns of merchandise adjusted by the DX branded independent service station dealers to whom he sells.

4. It is understood that Company retains the right to sell to any customer within the area served by the Distributor.

5. Distributor agrees to refer all claims for warranty adjustments on tires and tubes to supplier, it being understood that this Franchise does not confer on Distributor any authority to make such adjustments on behalf of supplier or Company, nor any authority to warrant any tires and tubes purchased hereunder, except as set forth in the supplier's Lifetime Tire Guarantee in effect on the date of resale by Distributor. It it also understood and agreed that this Franchise Agreement does not confer on Distributor any authority to make adjustments of warranty claims on supplier's batteries on behalf of supplier or Company, nor any authority to warrant any battery purchased hereunder, except as set forth in the supplier's Battery Warranty in effect on the date of resale by Distributor.

6. All invoices shall be due on the fifteenth proximo with such cash discounts as may be allowed from time to time on the particular items of merchandise purchased at prices specified in Company's price lists, or price lists of others adopted by Company; no discount on taxes and freight; payment to be made to the Company Marketing Department division office of the division in which Distributor is located. Company shall have the right to extend or withhold credit privileges at any time during the term of this Franchise Agreement, including the right to withdraw, suspend, or revise any credit terms or to decline to make any further deliveries except for cash. Sales on credit cards approved by Company may be made by Distributor or its dealers, but only as to such merchandise and upon such terms and conditions as Company may from time to time stipulate.

B-A-2

7. In case of a concurrent decline in Company's price list or the price list adopted by Company and in Company's net price to its franchised distributors or the net price to the franchised distributors adopted by Company on tires and tubes, Company will rebate to the Distributor by merchandise credit in accordance with the price protection policies adopted by Company and then in effect; provided, however, that such rebates will not be granted with respect to tires or tubes sold pursuant to special announcement that rebates will not be made with respect thereto.

8. Company shall not be liable for any delay in delivery or failure to deliver caused by fire, flood, strike, war, interruption of transportation facilities, inability to obtain merchandise, or any other cause, whether similar or dissimilar, beyond Company's control. Company, during any period of shortage in supplies of the merchandise covered by this Franchise Agreement, shall endeavor in good faith to secure a fair allocation of deliveries to its independent distributors, but Company shall not be liable to Distributor because of any such allocation. In no event shall Company be liable for loss of profits or special or consequential damages because of delay or failure to make deliveries.

9. This Franchise Agreement is expressly subject to all applicable restrictions imposed by any Federal agency or by any other governmental authority, whether Federal, State, or local.

10. This Franchise Agreement shall not be assigned by Distributor without the written consent of a Company Marketing Department Division Manager having been obtained, and no amendment of this Franchise Agreement shall be effective until written consent of a Company Marketing Department Division Manager has been obtained.

11. In case of default or breach on the part of Distributor in the performance of any of the provisions of this Franchise Agreement, Company may give Distributor written notice thereof, and if Distributor shall fail to cure such default or breach within ten (10) days thereafter, Company may, in addition to any other remedy afforded by law, terminate this Franchise Agreement. Waiver by Company at any time of the terms or provisions of this Franchise Agreement or the failure or delay of Company in any instances in exercising or enforcing any of its rights or privileges hereunder or any partial exercise or enforcement thereof shall not be construed as thereafter waiving such terms or provisions in the event of any subsequent violation or breach thereof by Distributor or precluding any further or other exercise of such rights or privileges.

12. This Franchise Agreement shall become effective upon the date approved and signed by a Marketing Department Division Manager of Company, and shall remain in effect thereafter until cancelled by either party upon sixty (60) days written notice to the other. At the expiration of said sixty (60) days, Company shall have the right to cancel all unfilled orders, and during such time may refuse to accept any orders in excess of the average sixty (60) day requirements of Distributor based on delivery requests actually given hereunder during the term hereof. Termination of this Franchise Agreement shall not discharge Distributor from any liability to Company theretofore accruing.

IN WITNESS WHEREOF, This Franchise Agreement has been executed in triplicate this 5 day of January, 19 65, by the undersigned Distributor.

DISTRIBUTOR

Company: Empire Oil Co Inc

T. L. Evans
Witness

By: Bobby Joe Lewis

Accepted, approved, and effective as of this _____ day of _____, 19____.

SUN OIL COMPANY — DX DIVISION

D. A. Brewer
Witness

By: _____
Division Manager

D-A-7

APPENDIX G

TBA Policy Manual
January 4, 1966

I. PURPOSES & DEFINITIONS

A.

The basic purposes of the new Sunray DX TBA program is to make available to its independent service station dealers, at competitive prices, nationally advertised brands of tires, batteries, and car accessories, to increase the DX dealers' ability to offer complete car service, which will make them more competitive in the petroleum market, and make more profit for the dealers.

B.

A DX Dealer is defined as any *petroleum marketer,* regardless of his contractual relationship to DX for petroleum products, who markets TBA products *essentially* at retail. In addition to dealers, Sunray DX has many petroleum jobbers and agents who are involved in the wholesale distribution of TBA. This new TBA program not only contributes to their gross profit, but affords them another means of cementing their relationships with their petroleum customers.

C.

A DX TBA Distributor is defined as any *marketer engaged* in the *wholesaling* of TBA products regardless of his contractual relationship to DX for petroleum

products, whose TBA marketing will consist in *substantial* part in *supplying* other *DX accounts,* and who has been *approved* for a ***DX TBA Distributor Franchise*** Agreement.

There are, however, other objectives of the Sunray DX TBA program. Aggressive sales promotion campaigns and proper merchandising can enhance the overall public image of DX stations. Large jobbers and dealers can be acquired and retained by assuring them of a more solid financial position. DX dealers, as a whole, can be upgraded; both financially and in the eyes of the motoring public. Dealers can be in a better position to choose the kinds and quality of merchandise they will sell.

The Sunray DX TBA program can help accomplish these objectives in many ways. The Advertising, Sales Promotion, and Merchandising departments will share, with the TBA department, the responsibilities for promoting and assisting the TBA program on all levels, including sales contests and incentive programs.

The active solicitation of TBA purchases on DX credit cards can be of great assistance to those dealers who do not have an established budget program of their own.

The DX sales organixation is staffed with ***TBA specialists*** who will *offer* sales assistance to *dealers* and distributors. In addition to *direct* selling this includes *merchandising,* advertising, and *sales* promotion.

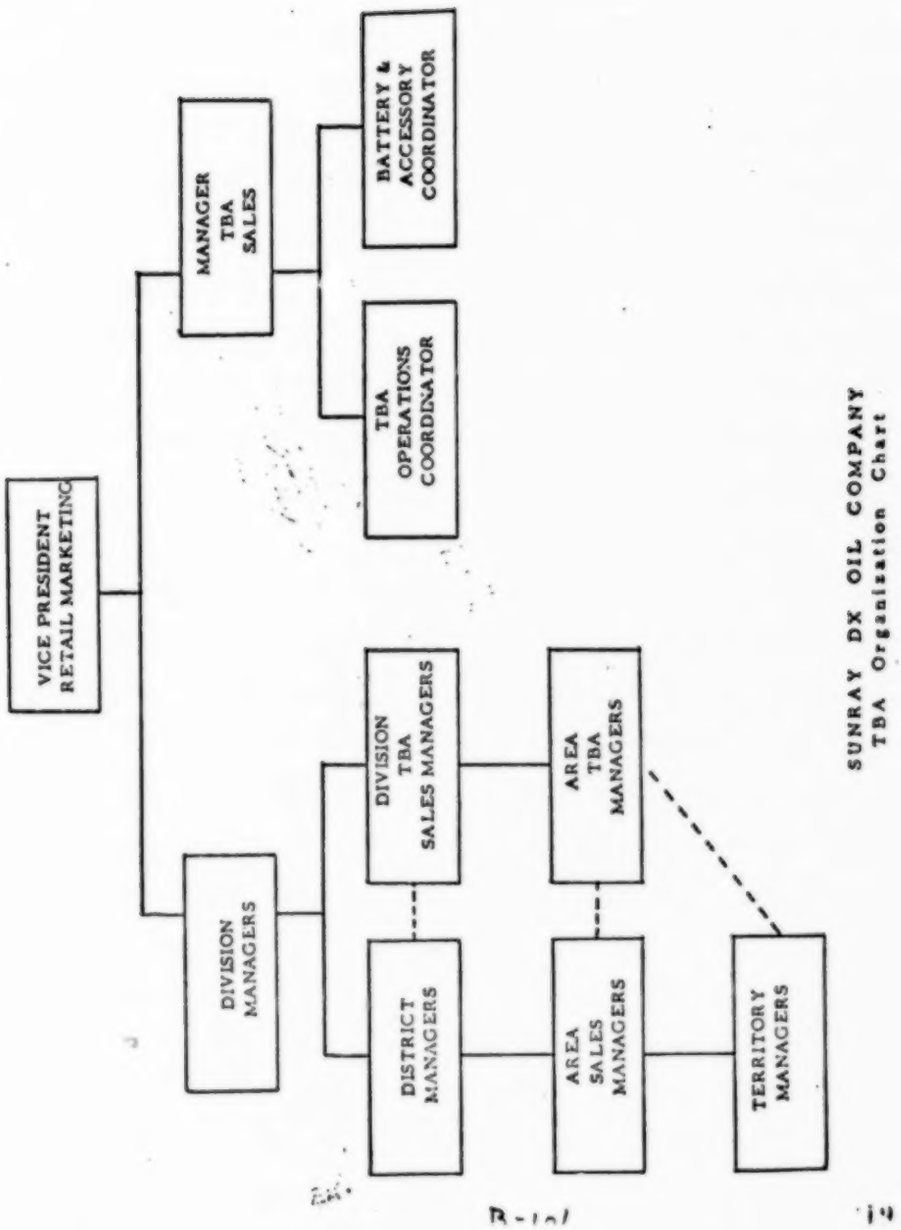
Basically the DX TBA *distribution* concept is built on a *foundation* of franchised ***TBA distributors.*** These distributors will serve as *supply points* for ***DX dealers,***

and are also charged with other important responsibilities which they must assume in order to meet the requirements of the Franchise.

In some areas there may be exceptions to the basic distribution concept where certain dealers cannot be supplied efficiently or economically by a franchised distributor. In such cases, at the discretion of the TBA Manager, these dealers may purchase TBA direct from Sunray DX.

Regardless of the *line of distribution,* the basic DX TBA MARKETING concept is *built* solidly *around* the ***DX dealer.*** He is the individual for whom the *entire* organization is working. Without his success, there is no success.

APPENDIX H



SUNRAY DX OIL COMPANY
TBA Organization Chart

APPENDIX I

TBA Policy Manual
January 24, 1966

2. *Inventory Ledger Balance Plan*

When local financing cannot be obtained to finance an adequate inventory of TBA and competitive conditions warrant, the Inventory Ledger Balance Plan may be used to offer financial aid to franchised TBA DISTRIBUTORS OR JOBBERS. The following policy is to be followed:

a. This type of financing is available only in states operating under the Uniform Commercial Code.

b. The account should supply at least one-half of the capital required to operate the business.

c. This plan is to assist the Distributor or Jobber in carrying an adequate inventory of TIRES AND TUBES only, and may cover all or only a part of such inventory.

d. Each Inventory Ledger Balance Plan must be approved by the following:

   1. Area TBA Sales Representative
   2. Division TBA Sales Manager
   3. Division Credit Manager
   4. SDX TBA Sales Manager

e. Repayment may be on either a liquidating or non-liquidating basis. If non-liquidating, a demand note

is to be used. If a liquidating plan, an installment note is to be used, with repayment to be made in up to 60 equal monthly installments, including interest.

f. Interest will be charged at the rate of 6% per annum, payable with monthly installments if on a liquidating plan, and payable quarterly in on a non-liquidating basis.

g. Fire and extended coverage insurance must be carried on the inventory in an amount not less than the balance remaining due on the note, with evidence of loss payable to SDX supplied to our Company.

h. An inventory of tires and tubes must be maintained at all times in an amount equal to or exceeding the balance owing on the note. A detailed inventory of tires and tubes will be taken jointly by the Jobber or Distributor and a SDX representative, at least every 90 days, and be signed by both.

i. A signed balance sheet and profit and loss statement will be submitted to SDX at least once every six months, and more frequently if deemed necessary.

j. The forms required to establish an Inventory Ledger Balance Plan are as follows:

(1) A balance sheet statement, and also a profit and loss statement if the request is for an account in business over six months.

(2) Inventory of tires and tubes to be included in the Inventory Ledger Balance Plan.

(3) Promissory Note, either demand or installment basis, depending on plan established.

(4) Security Agreement.

(5) Financing Statement.

(6) Guarantee Agreement, if required.

(7) Assignment of accounts receivable, if required.

k. Procedures—It is anticipated requests for the Inventory Ledger Balance Plan will be infrequent and only for the larger Distributors or Jobbers.

Since approval of the SDX TBA Sales Manager is required, you will probably be asked for credit approval prior to the preparation of the necessary forms to establish the plan. In considering approval, you should have knowledge of actual or anticipated sales, to judge if the inventory is adequate or excessive.

The amount of the note should normally be credited to the TBA accounts receivable ledger. On new accounts, it may be necessary to approve a special order, so the amount will not apply on the regular monthly shipping limit established.

Purchases to maintain the inventory would normally be made on regular credit terms. Where this plan is approved, there should be no need for dating terms on tires and tubes. Any request for tire and tube dating terms should be reviewed very carefully.

Inventories required every 90 days may be computed by using the price averages listed in the TBA procedures. When inventories are taken, the Company

Representative should review slow moving items, to avoid obsolescence, which would reduce our security.

Since inventories are required only every 90 days, sales should be observed closely to prevent reduction of inventory below the agreed amount. The Company Sales Representative calling on the account should also observe the inventory, and report any obvious reduction in inventory or reduced purchases.

Non-liquidating plans should be reviewed once a year, to determine if the plan can be changed to a liquidating basis. The liquidating plan should be encouraged, to permit the Distributor or Jobber to build an equity in his inventory. When a plan is changed from one basis to another, a completely new set of forms is required.

The public records should be checked to determine if there are any prior liens against the inventory. If possible for the Sales Representative to check the records, his letter of transmittal should state that he has checked, and also state if there are any prior liens.

If you feel the loan is not secure with the signature of the owner and his wife, both individually and as owners of the business, you may require a guarantee agreement to be signed by a person you deem reliable and responsible. Also, you may require additional security, such as a Real Estate Mortgage or a lien on specific items of equipment. An assignment

of accounts receivable may also be taken for additional security.

Financial aid extended under this plan will be taken into consideration in establishing overall credit limits for the Distributor or Jobber.

Adequate records should be established to make certain adequate, unexpired insurance is in effect, with loss payable to SDX, that inventories are taken and supplied to you as agreed, and that balance sheet and Profit & Loss statements are furnished as agreed.

Installment Note form number SDX-903A may be used for liquidating plans. Promissory Note form SDX-695-C may be used for non-liquidating plans, the note completed as a demand note, showing interest payable quarterly, with the due date indicated for the first interest payment.

A sample Security Agreement is attached for use in establishing the Inventory Ledger Balance Plan. A Financing Statement is also required, and you should use the standard form approved for the individual state. Our form number SDX-1799 may not be used, since this is a combination form.

APPENDIX J

INVENTORY LEDGER BALANCE PLAN
(SECURITY AGREEMENT)

For valuable consideration, and to secure the Promissory or Installment Note executed of even date herewith in the principal amount of $ 18,750.00 , and the interest thereon together with the costs and expenses incurred in the collection of the same, the undersigned Bobby Joe & Alma G. Craig , 5408 South 79th East Avenue, Tulsa, Oklahoma , having a principal place of business at 3903 South Harvard Street, City of Tulsa , State of Oklahoma , herein called "Debtor", does hereby mortgage and grant to Sun Oil Company, of Tulsa, Oklahoma, herein called "Secured Party", a security interest in and to Debtor's existing and hereafter acquired inventory of tires and tubes, together with the proceeds and all replacements thereof, herein call "Collateral".

Debtor covenants and agrees with Secured Party that until said indebtedness shall have been paid in full Debtor will maintain an inventory of tires and tubes purchased from Secured Party equal in value at Debtor's cost price to the balance of said indebtedness from time to time unpaid by Debtor to Secured Party.

The Collateral will be kept at the Debtor's place of business as set forth above and at such other locations as are set forth on the reverse side hereof and debtor will not move the Collateral from the above locations without the consent in writing of Secured Party's Division Credit Manager. Secured Party may examine and inspect the Collateral at any time, wherever located.

Debtor warrants that the Collateral is owned by it and is to be used in connection with Debtor's business of selling products at wholesale and retail and that it is not new and will not be subject to any security interest except that created hereby. Debtor will not dispose of the Collateral or Debtor's rights therein except in the normal course of business. Debtor will pay all taxes, levies and other impositions on such Collateral and will carry fire and extended coverage insurance thereon in an amount which shall be not less than the balance remaining due on said Note, with loss payable clauses in favor of Secured Party as its interest may appear. The policy or certificate thereof shall be delivered to Secured Party.

Upon request Debtor will join with Secured Party in executing such financing statements and/or continuation statements as Secured Party may deem necessary to perfect its security interest hereunder.

Not less often than once in each three month period Debtor shall furnish to Secured Party an inventory list showing the number of the various sizes and types of the items making up the Collateral.

In the event Debtor shall from time to time be entitled to any bonus from Secured Party, the latter may at its option apply the same to the reduction of any balance remaining due under said Note and/or the interest thereon. If the Note is an installment note, such bonus shall be applied to the last installments becoming due thereunder.

Debtor will maintain such records as Secured Party may request and will at any time at the latter's request send to Secured Party a signed balance sheet and profit and loss statement reflecting correctly Debtor's current business condition, together with any other statement or information with regard to its business as Secured Party may reasonably request.

For the purpose of determining the rights of the respective parties hereto, the following shall be deemed defaults hereunder:

(a) If Debtor becomes in default under any obligations under this Agreement or if Debtor shall be past due in its open account indebtedness to Secured Party.

(b) If Debtor sells such portion of its assets as may, in Secured Party's judgment, adversely affect the sale of tires and tubes.

(c) If Debtor's balance sheet shall at any time show Debtor to be insolvent. (According to American Institute of Public Accountants accounting practices).

(d) If Debtor becomes involved in any insolvency proceeding, whether State, Federal or otherwise.

(e) If Debtor shall cease to be an authorized dealer of Secured Party pursuant to the latter's standard form of Franchise Contract.

Upon the happening of one or more of said defaults, the entire principal and interest of the described note shall become due and payable at once at the option of Secured Party.

Debtor agrees that upon the happening of any default Secured Party may exercise any or all of its rights under the Uniform Commercial Code of this state. In the event of default, Debtor will at the request of Secured Party and at Debtor's own expense assemble the Collateral at a convenient place, acceptable to Secured Party, and make it available to Secured Party.

IN WITNESS WHEREOF, the undersigned has signed this instrument the 7 day of May, 19-69.

Bobby Joe Craig
Name of Debtor

Alma G. Craig

EXHIBIT B

Craig, Bobby Jo

INSTALLMENT NOTE

May 7, 19 69

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of SUN OIL COMPANY, at its office in Tulsa, Oklahoma the principal sum of eighteen thousand Seven hundred dollars ($18,750.00) with interest thereon from the date hereof at the rate of 8 per cent per annum on the principal sum remaining from time to time unpaid, in 60 equal monthly installments of Three hundred eighty dollars ($380.20) each, commencing the 1st day of June 19 69 & 20/100 and continuing until the principal amount hereof, with interest, has been paid in full, provided that the last installment shall consist of the principal amount then remaining unpaid together with accrued interest thereon. Each installment payment shall be applied first to the payment of interest accruing hereunder and the balance shall be applied in reduction of the unpaid balance of principal.

For application upon or against the aforesaid monthly installments of principal and interest, the undersigned, _____, shall pay to payee a sum equal to _____ cents (_____¢) per gallon on all gasoline purchased by _____ from payee, said sum to be paid at the time of each delivery until the principal sum hereof, with interest thereon, has been fully paid. In the event such payments during any month do not equal the amount of the above described installment payment for such month, the difference between such payments and the amount of the total installment for such month shall become immediately due and payable at the end of such month. In the event such payments for any month are more than such installment for such month, the excess will be credited to payment of the principal hereof, provided that the amount of the next or succeeding installments will not be reduced.

It is hereby expressly agreed that upon default in payment of any one of said installments, when due, or in case the present contractual relation between Bobby Joe & Alma G. Craig, and the payee herein named is for any reason discontinued, then all subsequent installments due hereunder, with interest, shall at once become due and payable at the option of the legal holder hereof without demand or notice, demand and notice being hereby expressly waived. In the event of default, the undersigned and all endorsers and guarantors also agree to pay the cost of collection, if any, including a reasonable attorney's fee.

Signature Bobby Joe Craig
Bobby Joe Craig
Address 3903 South Harvard, Tulsa, Okla.

Signature Alma G. Craig
Alma G. Craig
Address 1903 South Harvard, Tulsa, Okla.

BEST COPY AVAILABLE

INTER-OFFICE CORRESPONDENCE

TO: J. W. Spurrier - D144	FROM: P. H. Patrick
LOCATION: Diamond Inn	LOCATION: Credit - So. Division

SUBJECT: Inventory Ledger Balance Card - Bobby Joe Craig

MESSAGE: Mr. Brewer stated that you are aware of the arrangements made to set up Bobby Joe Craig as a Quaker States Distributor in Bill Claiborne's old location at 3903 S. Harvard. If so, will you please initial and date all copies of the attached Installment Note & Inventory Ledger Balance Card, and then return them to me for further handling.

DATE: 5-9-69 | REPLY: P. H. Patrick

DATE | BY

B-6-1

APPENDIX K

PROMISSORY NOTE

$25,000.00 Tulsa, Oklahoma May 12, 1969

On Demand after date, for value received, I, we, or either of us promise to pay to the order of SUNRAY DX OIL COMPANY

Twenty-five thousand and no/100---------- DOLLARS

at Tulsa, Oklahoma without defalcation or discount with interest at the rate of None per cent, per annum, payable On Demand

The principals, endorsers, sureties, and guarantors of this note hereby severally waive presentment and demand of payment, notice of protest, and extension of time of payment. If this note is not paid when due, and is placed in the hands of an attorney for collection or suit is brought thereon, the principals, sureties, and endorsers agree to pay a reasonable attorney's fee for the collection of same.

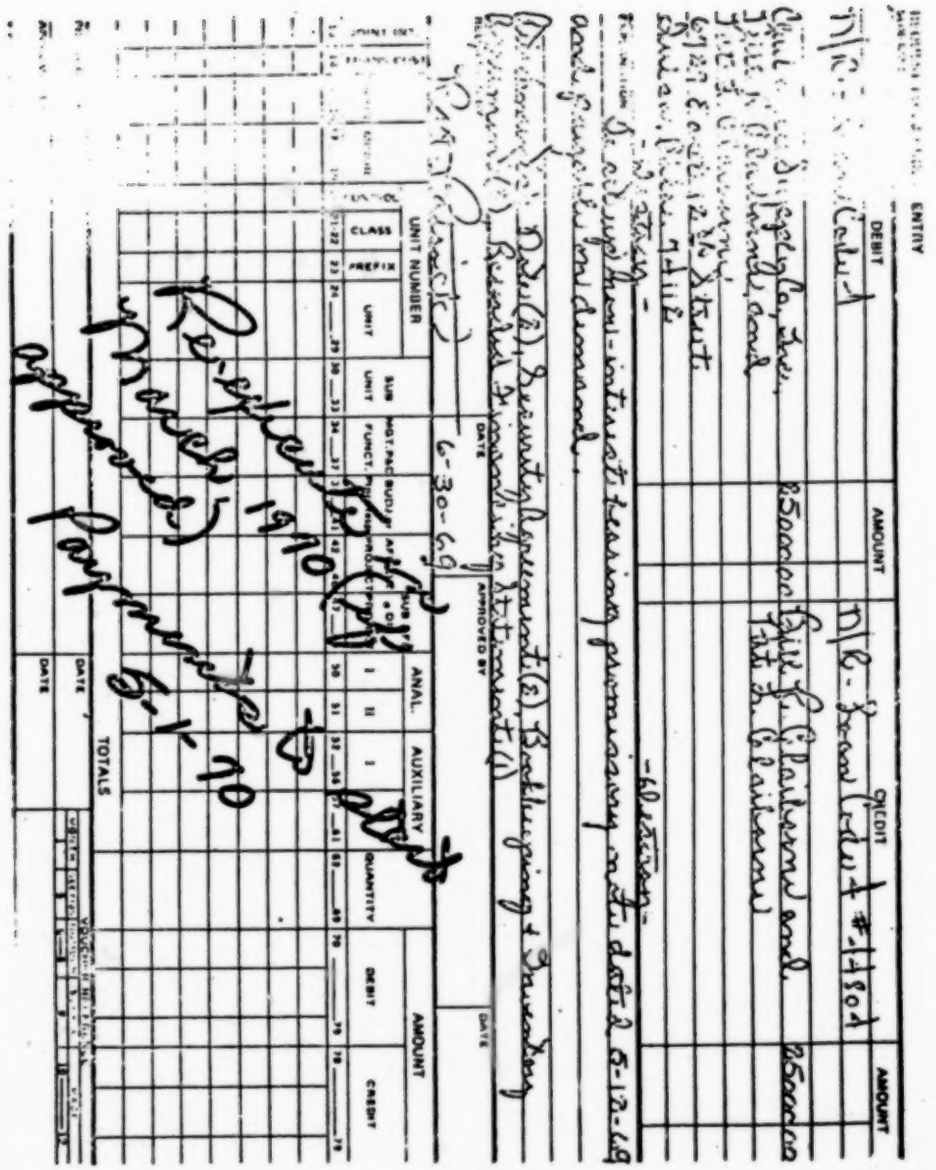
DUE On Demand

Claiborne Supply Co., Inc.

by: [signature] President

Pat G. Claiborne

DX-433-C



B-16

APPENDIX L

INSTALLMENT NOTE

May 12 19 69

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of SUN OIL COMPANY, at its office in Tulsa, Oklahoma the principal sum of Twenty-five thousand & no/100 Dollars ($ 25,000.00) with interest thereon from the date hereof at the rate of 8 per cent per annum on the principal sum remaining from time to time unpaid, in 60 equal monthly installments of five hundred six & 92/100 Dollars ($ 506.92) each, commencing the 1st day of July 19 69 and continuing until the principal amount hereof, with interest, has been paid in full, provided that the last installment shall consist of the principal amount then remaining unpaid together with accrued interest thereon. Each installment payment shall be applied first to the payment of interest accruing hereunder and the balance shall be applied in reduction of the unpaid balance of principal.

For application upon or against the aforesaid monthly installments of principal and interest, the undersigned, _____, _____, shall pay to payee a sum equal to _____ cents (_____¢) per gallon on all gasoline purchased by _____ from payee, said sum to be paid at the time of each delivery until the principal sum hereof, with interest thereon, has been fully paid. In the event such payments during any month do not equal the amount of the above described installment payment for such month, the difference between such payments and the amount of the total installment for such month shall become immediately due and payable at the end of such month. In the event such payments for any month are more than such installment for such month, the excess will be credited to payment of the principal hereof, provided that the amount of the next or succeeding installments will not be reduced.

It is hereby expressly agreed that upon default in payment of any one of said installments, when due, or in case the present contractual relation between Claiborne Supply Co., Inc. and the payee herein named is for any reason discontinued, then all subsequent installments due hereunder, with interest, shall at once become due and payable at the option of the legal holder hereof without demand or notice, demand and notice being hereby expressly waived. In the event of default, the undersigned and all endorsers and guarantors also agree to pay the cost of collection, if any, including a reasonable attorney's fee.

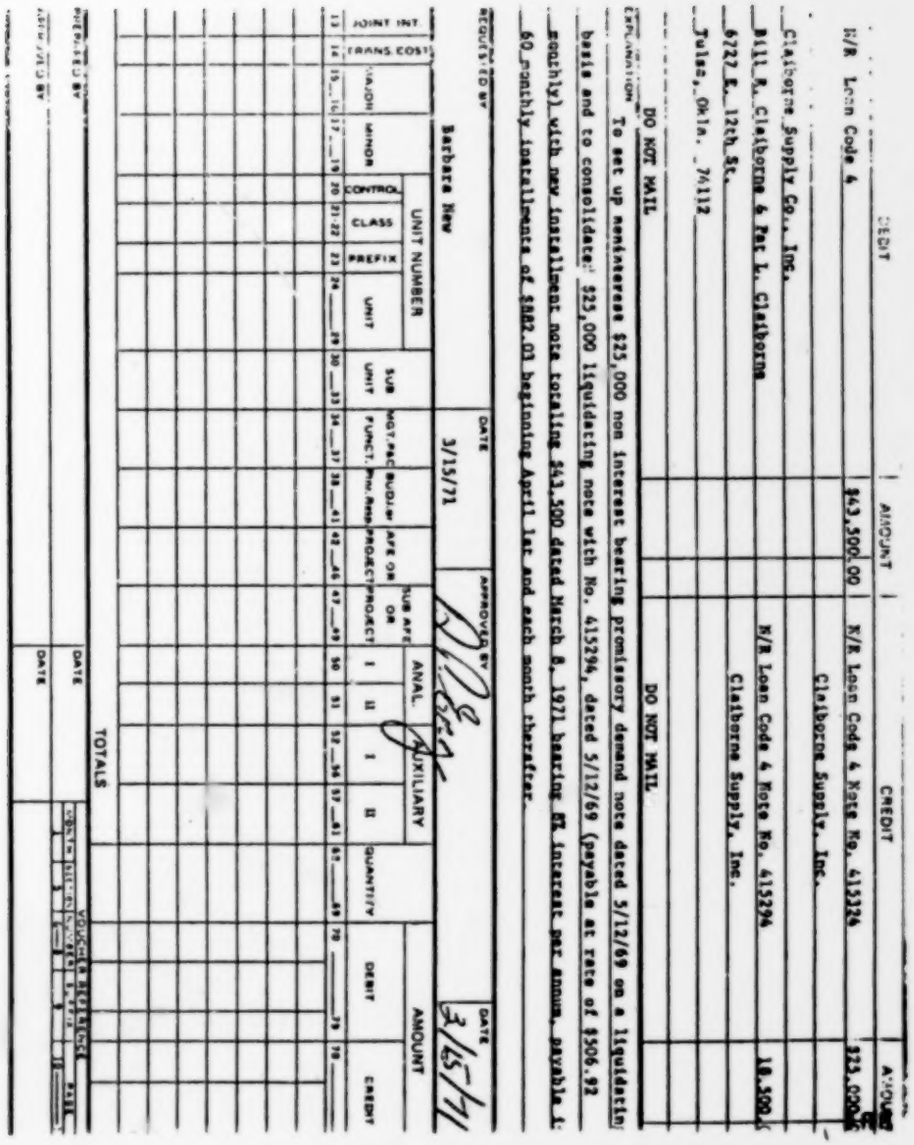
Claiborne Supply Co., Inc.

by: _____ President

Signature _____
Bill R. Claiborne
Addrss 6727 East 12th Street, Tulsa, Okla.

Signature _____
Pat L. Claiborne
Addrss 6727 East 12th Street, Tulsa, Okla.

B-15



APPENDIX M

Excerpts from the testimony of Donald A. Brewer

Mr. Donald A. Brewer was asked the following question:

"Q: Was any financial assistance or just financial arrangements made between Sun and Mr. Claiborne at that time?

A: Yes, we extended to Mr. Claiborne *$25,000* note covering tires, additional tire stock for his warehouse." (1st Dep. Brewer, P. 23, lines 3-8)

Mr. Brewer stated that *he* made the analysis for the credit department to obtain the information the credit department needed to decide on what they would give him and the *decision was made* to give him *$25,000.* (2nd Dep. Brewer, P. 24, lines 5-13)

Mr. Donald Brewer's deposition was taken again and he was asked:

"Q: Mr. Brewer, since you gave your deposition have you had occasion to read it?

A: Yes, I have.

Q: Did you notice anything in it since you gave that deposition that you would like to change or that did not appear to be accurate to you, Mr. Brewer?

A: Well, there are about seven items that are very small, insignificant. They are mainly things that were mispronounced or misspelled in the deposition, nothing of substance.

Q: Other than the *$25,000* loan for merchandise, was any other financing extended to Mr. Claiborne at the new location?

A: *I don't believe so.*

Q: The item *principal* and *interest* loan was that the loan that DX was to make to him in the amount of *$25,000?*

A: *Yes, that is correct."* (2nd Dep. Brewer, P. 2, lines 24-25, P. 3, lines 1-12, P. 25, lines 4-6, P. 30 lines 5-7)

APPENDIX N

First Claim

2. That Plaintiff brings this action under and by virtue of the Sherman Antitrust Act, and the Clayton Act, as amended by the Robison-Patman Act, namely 15 U.S.C.A. Sec. 1, 2 and 13(a)—(f) and the provisions of 15 U.S.C.A. §15. That the acts, transactions and matters hereinafter set forth and alleged all transpired or took place within Tulsa County, Oklahoma, save and except those matters which involve the flow of goods in interstate commerce, as more particularly set forth hereinafter, and this Court thereby has jurisdiction and venue over the present cause of action.

13. That for several years immediately preceding May 5, 1969, Defendant Claiborne was the only Sun distributor of tires to Sunray DX dealers and other service station dealers in Tulsa, Oklahoma, and the old location of Claiborne at 3903 South Harvard was the only Sun distributor facility in Tulsa, Oklahoma, warehousing tires for such purpose. That it was the common purpose of Sun and Claiborne that after Sun made Claiborne an additional distributor of tires to Sunray DX dealers on or about May 5, 1969; that insofar as Claiborne and Craig were concerned, Claiborne would continue to be the only Sun distributor supplying tires to Sunray DX dealers and other service station dealers in Tulsa, Oklahoma; and the new location of Claiborne would be the only Sun distrib-

utor facility in Tulsa, Oklahoma, warehousing tires for such purpose and that such common purpose was accomplished when the business conducted by Craig at the old location ceased and was totally destroyed on or about February 25, 1970, as the direct and proximate result of the concerted acts of discrimination in price, credit, cash rebates, services and facilities of Defendants aforesaid done openly or secretly, all to Craig's damage and loss as below set forth.

APPENDIX O

O-1

Clayton Act, 15 U.S.C.A. Section 13(b), (d) and (e), October 15, 1914, C. 323, Section 2,38 Stat. 730, as amended by the Robinson-Patman Act, June 19, 1936, C. 592 Section 1, 49 Stat. 1526 Section 2(b), (d) and (e) respectively:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale

of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for re-sale with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

O-2

Amendment 7 Constitution of United States.

Trial by jury in civil cases.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

O-3

Federal Rules of Civil Procedure, Rule 38. Jury Trial of Right, as amended Feb. 28, 1966, eff. July 1, 1966:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later that 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the pleading of the party.

"(c) Same; Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

"(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

O-4

Federal Rules of Civil Procedure, Rule 56. Summary Judgment, as amended Dec. 27, 1946, eff. Mar. 19, 1948; Jn. 21, 1963, eff. July 1, 1963:

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits

or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

O-5

Federal Rules of Civil Procedure, Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judment on Pleadings, as amended Jan 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

O-6

Sherman Act, Section 1, Trusts, etc., in restraining

of trade illegal; exception of resale price agreements; penalty, July 2, 1890, C. 647, Section 1, 26 Stat. 209; Aug. 17, 1937, C. 690, Title VIII Stat. 693; July 7, 1955, C. 281, 69 Stat. 282:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in

competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000.00 or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

O-7

Clayton Act, Section 4 (October 15, 1914, C. 323 Section 4, 38 Stat. 731, 15 U.S.C. Section 15):

"Any Person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the District in which the defendant resides or is found or has an agent, with respect ot the amount in controversy, and shall recover threefold the damages by him sustained, and the Cost of Suit, including a reasonable attorney's fee."

Supreme Court, U. S.
FILED
JUN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1777.

BOBBY JOE CRAIG,

Petitioner,

v.

SUN OIL COMPANY OF PENNSYLVANIA

and

WILLIAM R. CLAIBORNE,

Respondents.

BRIEF OF SUN OIL COMPANY OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. A-869.

—

BOBBY JOE CRAIG,

Petitioner,

v.

SUN OIL COMPANY OF PENNSYLVANIA

AND

WILLIAM R. CLAIBORNE,

Respondents.

—

BRIEF OF SUN OIL COMPANY OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19(1). The instant Petition for a writ of certiorari goes to bizarre extremes in attempting to present an important issue for this Court's review. In fact, it is difficult even to discern that the Petition relates to this case. The Petitioner simply ignores his case and attempts to create a new one. However, by reading the opinions of

the district court and the United States Court of Appeals for the Tenth Circuit, it will become apparent that this is an antitrust case (primarily founded upon Sherman Act allegations with additional allegations under the Robinson-Patman Act) which was carefully decided on motions for summary judgment on narrow legal issues and, with regard to some claims, on the basis that there was no genuine issue as to any material fact. In all instances, compliance was had with the procedural requisites of Rule 56 of the Federal Rules of Civil Procedure. In his attempts to avoid the decisions below and to create an issue meriting certiorari review, the Petitioner has grasped at some wording in the Tenth Circuit decision not even pertaining to a direct holding in this case and has attempted to fashion from this language a novel and complicated argument bringing into play the Seventh Amendment to the United States Constition. This attempt has also involved the Petitioner in a gross misstatement of the facts of the case.

COUNTER STATEMENT OF CASE.

In May, 1969, the Petitioner (hereinafter "plaintiff") purchased a tire business located at 3903 South Harvard, Tulsa, Oklahoma, from defendant William R. Claiborne ("Claiborne") (amended complaint, paragraph 3).[1] A copy of the purchase agreement is attached to the amended complaint as Exhibit A and provides in pertinent part as follows:

> The Seller hereby agrees that for a period of five years to refrain from the use of his name in the retailing of tires in an area bounded by 21st St. on the north, the river on the west, 71st St. on the south, and Mingo Rd. on the east in the City of Tulsa, Oklahoma.

For some time prior to this purchase, Claiborne, who operated out of several locations in the Tulsa area, had had a Firestone TBA[2] distributorship with respondent Sun Oil Company of Pennsylvania (hereinafter "Sun"). In connection with this purchase, Sun agreed to grant plaintiff a Firestone TBA distributorship, to extend plaintiff a line of credit and to finance the plaintiff's purchase of equipment and inventory from Claiborne. Sun refused to finance the plaintiff's purchase of "goodwill" from Claiborne. Since Claiborne had previously financed the inventory and equipment at his 3903 South Harvard location with Sun, the new financing included the cancellation of Claiborne's notes covering this inventory and equipment and the signing of new notes by plaintiff. Part of the cancellation of Claiborne's indebtedness to Sun was accomplished by

1. References are not to an appendix or to pages of the record on appeal since, under the local rules of the United States Court of Appeals for the Tenth Circuit, no appendix was required, and counsel for Sun were never furnished either a copy of the record on appeal or the pagination (if there was any) of such record.

2. Tires, batteries and accessories.

plaintiff paying part of the purchase price directly to Sun. (See paragraph 7 of Sun's answer.)

Shortly after plaintiff went into business at the South Harvard location, Claiborne opened a tire warehouse from which he continued in the tire business (amended complaint, paragraph 5). However, Claiborne did not retail tires from this new location. The operation was one hundred percent wholesale, at least to the knowledge of Sun (Brewer deposition, first day, page 26). For reasons which were very much in dispute in the litigation, the plaintiff was unsuccessful in his operation of the tire business, and ceased doing business in February 1970 (amended complaint, paragraph 12), although the plaintiff himself ceased working at the store in October 1969 (deposition of plaintiff, first day, page 111). The plaintiff thereafter failed to pay on its promissory notes to Sun, and it was necessary for Sun to initiate legal proceedings against the plaintiff in state court. (See amended complaint, paragraph 12.)

The plaintiff filed his amended complaint against Sun and Claiborne on May 21, 1973. The complaint primarily attempted to state a conspiracy under section 1 of the Sherman Antitrust Act, 15 U. S. C. A. § 1 (1973). The plaintiff alleged that Claiborne, in selling him the South Harvard location, had represented to him that he was "getting entirely out of the tire business," that Sun knew this and that Claiborne, "with the assistance of Sun Oil Company, and pursuant to a common design of both," began selling tires at the new location and recaptured the dealer and fleet business that he had previously serviced from the South Harvard location (amended complaint, paragraph 5). The crux of the amended complaint appeared in paragraph 8:

> That Sun Oil Company and Claiborne remained silent about their secret plan for Claiborne to open the new facility under the old distributorship of Claiborne when issuing Craig the new distributorship to operate the old facility and induced Craig into believing that he was substituted for Claiborne as distributor rather than being made only an additional distributor . . . .

Plaintiff went on to allege that Sun "favored Claiborne over Craig to insure the success of the new facility to the exclusion of Craig from the market and destroyed his business . . . ." (amended complaint, paragraph 9) Plaintiff then alleged that Sun discriminated in favor of Claiborne by giving him more favorable prices, credit terms, advice and cash rebates. (amended complaint, paragraphs 10 and 11) Asserted as a legal basis for these allegations of discrimination were the Robinson-Patman Act, 15 U. S. C. A. § 13 (1973), and a comparable Oklahoma antitrust statute.

After discovery in the case had been substantially completed, both defendants moved for summary judgment. The district court granted these motions and entered judgment in favor of defendants, and the United States Court of Appeals for the Tenth Circuit affirmed. (Appendices B and A to Petition for Writ of Certiorari)

ARGUMENT.

The primary holdings of the two courts which have considered this case are barely mentioned in the Petition. The major thrust of the complaint was a Sherman Act conspiracy, and both the district court and the Tenth Circuit held that the facts alleged did not state a cause of action under section 1 of the Sherman Act since, under well established law in the Tenth Circuit [3] and in other circuits,[4] a plaintiff must allege a decrease in competition or the number of competitors, and here the conspiracy alleged was to put another competitor into the market. The Petition gives but passing mention to this holding (pages 21-22) and does not seriously argue that this holding merits certiorari review under Supreme Court Rule 19.

Secondly, the Tenth Circuit and the district court held that, assuming as true the facts alleged as to credit discrimination, they could not as a matter of law be the basis for a claim under sections 2(a) or (e) of the Robinson-Patman Act.[5] *See Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959); *Skinner v. United States Steel Corp.*, 233 F. 2d 762, 765 (5th Cir. 1956); *Cook v. Ralston Purina Co.*, 366 F. Supp. 999, 1011 (M. D. Ga. 1973). As with the Tenth Circuit's ruling on the Sherman Act claim, the Petition simply mentions this

3. *Fedderson Motors v. Ward*, 180 F. 2d 519 (10th Cir. 1950).

4. *Ace Beer Distrib. v. Kohn, Inc.*, 318 F. 2d 293 (6th Cir.), *cert. denied*, 375 U. S. 922 (1963); *Joseph E. Seagram and Sons v. Hawaiian Oke and Liquors Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); *Parmelee Transp. Co. v. Keishin*, 186 F. Supp. 533 (N. D. Ill. 1960), *aff'd*, 292 F. 2d 794 (7th Cir. 1961), *cert. denied*, 368 U. S. 944 (1961).

5. The Tenth Circuit qualified its Opinion as follows: "We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme violation was alleged here by any means." (Page A-7 of Petition For Writ of Certiorari).

ruling and makes no argument regarding the same (page 22).

Thirdly, the Tenth Circuit and the district court held that the undisputed evidence, consisting of a number of depositions, including that of the plaintiff, and of many documents produced through discovery, demonstrated that there was no factual basis for a claim of discrimination in price between the plaintiff and Claiborne under section 2(a) of the Robinson-Patman Act. Counsel for Sun can find no reference to this holding in the Petition, and apparently the plaintiff does not seek review of this ruling.

Finally, the Tenth Circuit and the district court held that it appeared from the depositions and documents (offered by plaintiff and supported by affidavit) that there was no genuine issue as to any material fact on the issue of whether Sun offered "any services . . . connected with the processing, handling, sale, or offering for sale" of TBA to Claiborne which it did not offer to plaintiff "on proportionally equal terms." Section 2(e) of Robinson-Patman Act, 15 U. S. C. A. § 13(e) (1973). The district court held, and the Tenth Circuit affirmed, that, when Sun offered an affirmative showing that there was no such discrimination,[6] the plaintiff failed to "set forth specific facts showing that there is a genuine issue for trial." Federal Rule of Civil Procedure 56(e).

This holding as to discrimination in services seems to be the second of two issues which, according to the Petition, merit review by this Court. (See pages 10-21 of the Petition.) The plaintiff asserts that both the district court and the Tenth Circuit erred in finding that he had failed, under Rule 56(e), to come forward with any facts demonstrating a genuine issue for trial and seeks from this Court

6. This showing consisted of the submission of the depositions of plaintiff, plaintiff's brother (who managed plaintiff's business) and a Sun employee on questioning by plaintiff's counsel.

the opportunity to attempt, for the third time, to construct an inferential chain from which a relevant fact might be gleaned.

It would not be proper in this Brief for Sun to set forth in detail the misleading nature in which the plaintiff sets forth the evidence cited in his Petition. The proper question on this Petition is as to whether the question presented is so important, in light of the considerations set forth in Supreme Court Rule 19, that this Court should undertake to scrutinize in detail the evidence presented to the district court and reviewed again by the Tenth Circuit. That such a factual question does not merit the review of this Court is patently clear. Nevertheless, Sun does consider it important to lay to rest one particular citation of the plaintiff, raised for the first time in this Petition.

After citing the testimony of Mr. Davis, a Sun employee, to the effect that the plaintiff asked for and received more service than Mr. Claiborne, the plaintiff in the Petition goes on to state that: "This is directly contradicted by the deposition testimony of Bobby Joe Craig." (page 11). The testimony purportedly supporting this assertion is found at the top of page 12 of the Petition. The first two questions and answers are lines 19-24, page 89, testimony of plaintiff on April 21, 1970, and inquire whether the plaintiff asked representatives of Sun to come out and give him help, and the plaintiff responded that he asked Mr. Davis to come out. The next question in the deposition was not the next question quoted at page 12 of the Petition. The quoted question, regarding Mr. Davis fulfilling his obligations, is found at page 91, line 22, and does not pertain to Mr. Davis fulfilling an obligation to come out and give the plaintiff help. In order to understand what this testimony did refer to, it is necessary to read the testimony between pages 89 and 91, which the plaintiff conveniently left out without any indication of its omission.

After testifying at page 89 that he sometimes asked Mr. Davis for help, the plaintiff next testified that what he asked Mr. Davis to do was to "straighten out some cost structure on some pricing," and that Mr. Davis came out but did not straighten it out, but Mr. Fehrenbacher, another Sun employee straightened it out in six weeks or two months (page 90, lines 1-18). The fulfillment of obligation testimony on page 91 referred to Mr. Davis straightening out this pricing. After testifying that Mr. Davis "never did fulfill it," he was asked:

> Q. What was his obligation to you?
>
> A. Obligation to me was to get it straightened out.
>
> Q. What now, what?
>
> A. The price on tires, my cost.
>
> Q. All right. Does this discrepancy still exist?
>
> A. No, it's not now. They finally took care of it.
>
> Q. Well, then, it was straightened out to your satisfaction?
>
> A. Yes, sir, after six weeks or two months.

Page 91, line 25 to page 92, line 8.

It is clear from the above that the evidence which the plaintiff cites simply does not stand for the proposition for which it is cited. However, more importantly, Sun would make the point that this Court should not exercise its certiorari jurisdiction to hear this matter for the third time.

Sun has set forth above the holdings of the Tenth Circuit and the position of the Petition with regard to each. However, the first question raised by the Petition, and the one argued with the greatest vigor, has not yet been discussed because it does not even relate to an issue truly in this case and is raised for the first time in this Petition. The plaintiff, at page 3 of his Petition, focuses on the statement by the Tenth Circuit that:

> The allegations of the complaint relating to discrimination in the furnishing of facilities are conclusionary only. The record contains nothing which could relate to such an allegation.

and seeks to manufacture an issue somewhat as follows: Since this issue was raised by the amended complaint, it is an issue in the case, and to deprive plaintiff of his claim in this regard denies him his Seventh Amendment right to a jury trial.

Unfortunately, the plaintiff has not seen fit to include the amended complaint in his Petition. Although the amended complaint made specific allegations as to discrimination in services between plaintiff and Claiborne (see paragraph 11), there is only one conclusory mention of discrimination in facilities in this pleading: ". . . proximate result of the concerted acts of discrimination in price, credit, cash rebates, services and facilities of Defendants . . . ." (paragraph 13). This is why the Tenth Circuit referred to the conclusory nature of this allegation. However, Sun's motion was not based upon the conclusory nature of this pleading but rather upon the clear deposition testimony of the plaintiff himself and of his brother that there was no discrimination in services or facilities. Faced with this testimony, it was plaintiff's obligation under Rule 56(e) "to set forth specific facts showing that there is a genuine issue for trial." Not only did the plaintiff fail to come forward with any evidence of discrimination in facilities, but also he has not ever suggested, even in his Petition, that he has anything at all to present if a trial on this issue were to be held.[7] As this Court stated

7. In this regard, it should be noted that the motions for summary judgment were not filed at the beginning of the discovery period but rather after the case had been called for a final pretrial conference and after discovery had been substantially completed and the case was ready to proceed to trial.

in *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968):

> To the extent that petitioner's burden of proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigant's rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

CONCLUSION.

It is clear from the strained nature of plaintiff's attempts to create an important issue that no such issue exists which would merit this Court's review. For this reason and for the further reason that the decision of the district court as affirmed by the Tenth Circuit was clearly correct, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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